OTTO VON GIERKE

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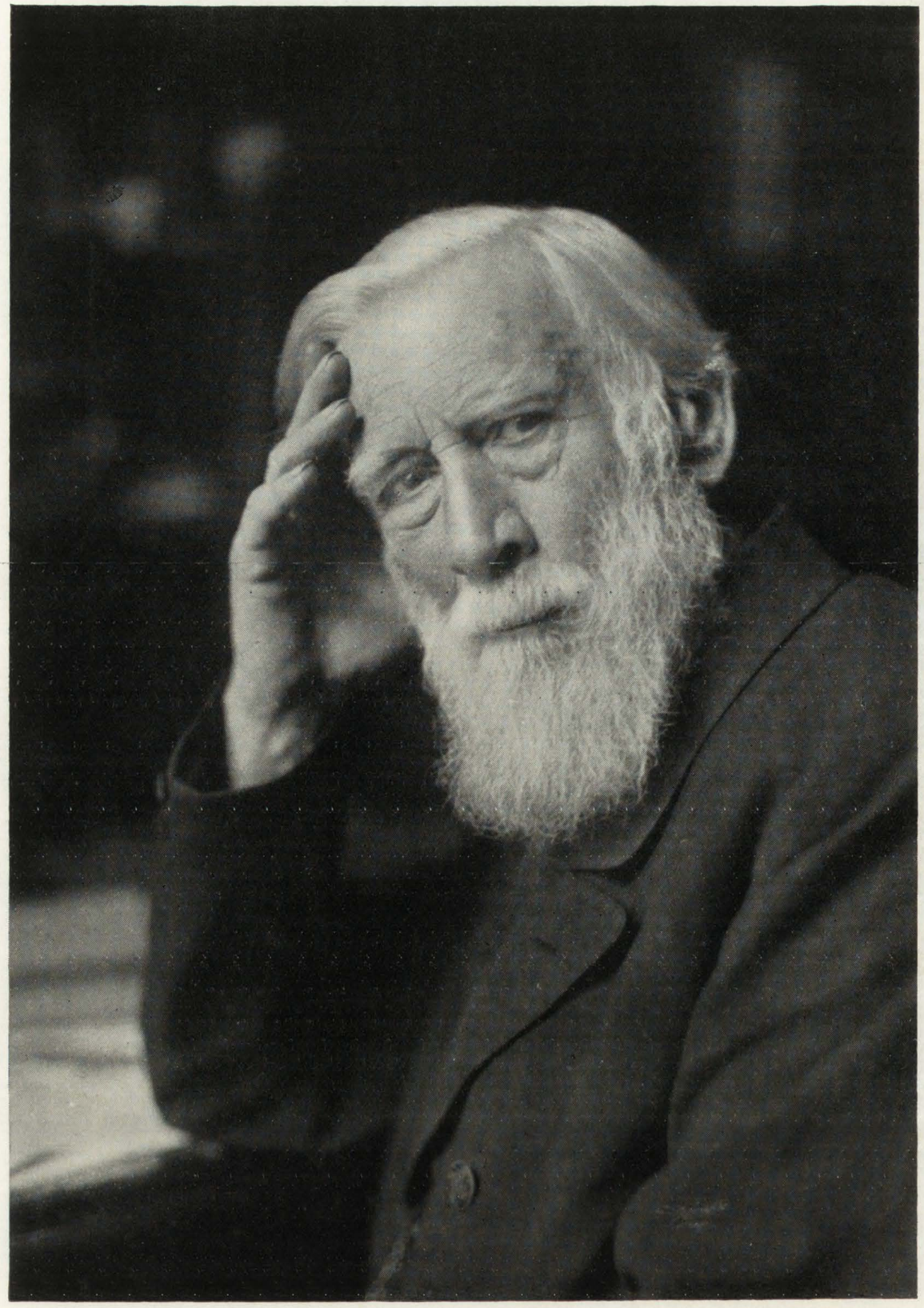

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OTTO VON GIERKE

HIS POLITICAL TEACHING AND JURISPRUDENCE

by

SOBEI MOGI

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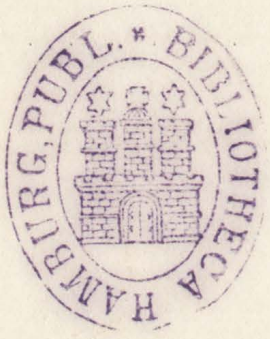

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TO

THE MEMORY OF

MY MOTHER

CONTENTS

INTRODUCTION

THE stores of knowledge which Otto von Gierke presented to us in the field of history, philosophy, law and politics far surpass those of any others who have engaged in the subjects of his life-long work. Gierke was not only a jurist, he was also an historian and a philosopher, and through the medium of his deep and wide knowledge of historical facts he was the founder of the Germanic school of law in modern times on the basis of his *Genossenschaftstheorie*. The stress which he laid on the principle of unity in plurality in human association—from the commune to the state and finally to the international community—which is the essential aim and basis of the *Genossenschaftstheorie*, has been one of the motive forces contributing to the rise of the new pluralistic conceptions in politics and jurisprudence, and a response in part to Gierke's great effort to overthrow long-prevalent legal hypotheses and dogmas.

No matter what differences may emerge in the development of the pluralist movement between his ideals and the pragmatic philosophical basis, the aim for which he strove was the harmonious co-ordination and adjustment of the two contrasting ideas of plurality and unity. Gierke's attitude towards the scientific method is that of entire opposition to metaphysical dogmatism; it is the application of the inductive method to the actual working of the social forces in human life, with deductive conclusions derived from philosophical and ethical principles.

The attention given to Gierke by writers belonging to English schools of thought is not altogether satisfactory; and his teaching has been made known to English readers only to a limited extent by Maitland and some others. In order to promote the further development of political pluralism a thorough study of Gierke, and especially of his doctrines as to public association, is however of the highest importance.

The purpose of the present work is to fill the gap: to

set out as clearly as possible Gierke's theory of the state and his teaching on the subject of political organisations, and so to indicate what students of political science can learn from his voluminous writings, in which repetition is sometimes carried to excess, and what those writings can contribute to the political theory of the future. In writing this book I have endeavoured to distinguish clearly between the Anglo-American pluralistic conception of the state and the Germanic pluralistic ideas, so that from the contrasting lines of thought the true lines of political development may suggest themselves.

On this occasion my hearty thanks are due to Professor H. J. Laski, Professor M. Ginsberg and Mr. Percy Ashley for their valuable suggestions on this subject.

Also I must express my indebtedness, as regards the sketch of Gierke's life, to Frau von Gierke, who was so good as to give me an interview and supply some items of information.

SOBEI MOGI

LONDON, 1932

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CHAPTER I

THE LIFE OF OTTO VON GIERKE

WITHOUT recourse to Otto von Gierke no conception of *Genossenschaft* can be formulated as a political and legal theory. His life-long work was wholly devoted to the establishment of the system of the *Genossenschaftstheorie* in public as well as in private law. His famous sentence "Without conflict there is no life" expresses his consistent effort for the assertion and acceptance of the idea of association, not only academically but also in practical political and legal activities for the promotion of Germanic legal principles against the Romanic and positivist formalism.

A great jurist, Otto Friedrich Gierke was born at Stettin on January 11, 1841. His father, Julius Gierke, held at that time the office of *Stadtsyndikus* (Town Commissioner), and his mother was Therese Zitelman. In the summer of 1848 the family removed to Berlin, where the father, a highly cultured man and interested in politics, became an active member of the Prussian National Assembly, and was appointed Minister of Agriculture in the Auerswald-Hansemann Ministry. On his seventieth birthday Otto Gierke said that his life memories began with childish games in the ministerial garden at Berlin. In 1850 Julius Gierke was appointed Chief President of the Court of Appeal at Bromberg, and there Otto entered the lowest class (Sexta) of the gymnasium, the head master of which was a capable mathematician, Deinhardt. Many years afterwards Gierke himself spoke

in high praise of the excellence of this school. But in 1855 there came a great blow in the death of both the parents from cholera. Fortunately his mother's family was able and ready to help Otto and the five younger children, and they always had happy memories of the Zitelman house at Stettin and their grandmother's country house at Hökendorf near Altdam.

Otto Gierke was shown great affection by his eldest uncle, Otto Zitelman, a counsellor of justice, and his aunt, a daughter of Gierke's teacher of German and history, Ludwig Giesebrecht. Although they had several children of their own, they really took the place of parents to Otto, who owed much to his uncle's wise advice. The rest was done by his school, the *Marienstiftgymnasium*, where at that time there was "a rare selection of highly intellectual teachers of striking ability." In the two years Otto Gierke spent in the top form he was the pupil of an unusual group of distinguished men, and under their influence there were the beginnings not only of his wide general culture and powers of exposition and of his philosophical train of thought, influenced to a certain extent by Hegel, but also of his leaning towards a national romanticism and his inclination to history.[1] That history was, however, always general and rather abstract; it was not influenced by local sentiment. It is noteworthy that Gierke never once lectured on the history of Prussian law. Ulrich Stutz has pointed out that Gierke "was and remained always an expert in the common-German past and perhaps for this reason felt himself later particularly at home in Berlin where other scholars, to their sorrow, do not get so much out of environment and life for the history of law and for teaching and research work as they do elsewhere." Historical erudition seems to have been so considerably developed in the school years of this highly gifted young man that on his leaving school in the autumn of 1857 his uncle strongly advised that in entering on the study of law he should aim at an academic career. Otto's decision

[1] Ulrich Stutz. *Zur Erinnerung an Otto von Gierke.* In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte.* Band XLIII. Weimar, 1922, p. x.

to follow that advice resulted not only in an immense success in his own juristic career, but also in the fruitful achievement of the creation of the Germanic *Genossenschaftstheorie*.

Gierke spent his first semester at Berlin and the next three semesters at Heidelberg, where he was a member of one of the student corps, the holidays being spent in travel in the Alps and to Venice; the two final semesters were spent again in Berlin. He preferred the teachers at Heidelberg to those at Berlin, and particularly Vangeraw, the authority on the Pandects, Jolly (afterwards one of the ministers of Baden), whose lectures on German legal history he attended, and the historian, Ludwig Häusser. When however he went back to Berlin for his last two semesters, his opinion changed. This was largely because he came to know and be greatly influenced by Georg Beseler, the pioneer of the *Genossenschaftstheorie*, whose influence upon Gierke was strengthened by the fact that he himself was an enthusiastic Germanist.

Gierke has always again and again recognised his indebtedness to Beseler—as, for example, in 1889 by a warm obituary notice, the first of three coming from his pen.[1]

In his sixth term, in 1860, he presented a thesis entitled *De debitibus feudabilibus*, which was favourably criticised by Gustav Homeyer. This, his first public writing, was characterised by good construction and completeness, but particularly by its enthusiastic Germanism, akin to that of Beseler, and strong hostility to the juristic theories of Carl Friedrich Gerber, of whose German law Gierke said later that in it the German spirit was dead. Gierke's remarkable academic progress was shown by the fact that in August 1860, when he was not yet nineteen, he took the degree of doctor in both branches of law.

Gierke's actual creative work did not begin until some five years later. After serving his year in the army and a

[1] Otto Gierke. *Georg Beseler.* In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte.* Band X, 1889, pp. 1–24.

period of probation, he was nominated a *Gerichtsassessor* in 1865, and began to prepare for admission as a university lecturer. In the choice of a subject for the dissertation which had to be furnished in support of the application Gierke took the advice of Beseler. It was called *Die deutsche Genossenschaft* and was concerned with the essential subject-matter of the teaching of Beseler himself, who more than twenty years earlier, in his famous *Volksrecht und Juristenrecht*, published in 1843, had derived that idea from the soul of the Germanic consciousness of law, and had sought to elaborate it in his later handbook. But with him it had remained vague and indefinite; now it was to be elaborated and given substance, and brought into relation to the state, as the union of unions, by his pupil, Gierke. The selection of this subject was a remarkable testimony on the part of the master to his pupil's ability, and showed also the courage of the pupil; but this confidence and courage were surpassed by the success which, as Gierke's biographer has said, gave "to Gierke himself no small happiness and to Beseler the greatest joy known to a master, that of having trained a student who surpassed him, thereby increasing his service and fame to posterity."[1]

Gierke's excellent health, which was not disturbed until he was about sixty, allowed him to work with great energy and persistence; he found recreation only in intercourse with some friends and the constant cultivation of "good society." Of the latter Gierke had need all his life; it did not interfere with his work but actually stimulated it. According to Frau Gierke, who survived him and is now eighty-one years of age, as a young man he used to work at night until a late hour, and on returning home from a party he would sit down and work until daybreak; but in later life he started work early in the morning and ended it early in the evening. Constant intercourse with all kinds of people was necessary to save his outward heaviness of manner from gaining the mastery

[1] Ulrich Stutz. *Zur Erinnerung an Otto von Gierke.* In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte.* Band XLIII, pp. xii–xiii.

over his innate charm, and also to enable him to combine theoretical and practical ideas.

The war of 1866 interrupted his studies, and he took part in the battle of Königgrätz as a lieutenant in the *Landwehr* artillery. In the next year, when the Luxemburg question once more threatened another summons to the flag, he decided to hasten his application, and as he had now realised that he could not deal with the whole history and law of the *Genossenschaft* at one stroke, the thesis which he presented to the Faculty in April, 1867, was only rather more than a third of that history of the law of the German *Genossenschaft* which was published in the following year (*Das deutsche Genossenschaftsrecht*) and had as a supplement a detailed sketch of the history of the German corporation idea, both accompanied by an outline of the proposed work as a whole.

In the test reading (*Probevorlesung*) on May 17th, which dealt with the relation of public and private law, Gierke developed, though only in a preliminary way, his later argument as to the original unity of all law in Germany. Finally the application for admission as a lecturer in German, Prussian and constitutional law was completed by a public lecture, delivered in Latin, on the difference between the craftsmen's guilds of earlier and later times. This was of course based on the work done as a preliminary to the legal history of the German *Genossenschaft*.

That great work, *Das deutsche Genossenschaftsrecht*, published by the Weidmann Press, on Theodor Mommsen's introduction, in 1868 was a remarkable achievement in German legal history. Whilst the earlier part of this work has to some extent been superseded as the result of later researches (some of them Gierke's own), yet the broad lines of development which he indicated have remained substantially unaffected, and particularly the conflict through the centuries between *Genossenschaft* and *Herrschaft*; and some of the conclusions, such as the idea of the importance of the guilds for the development of municipal freedom and municipal liberty and the

formation of other associations—e.g. the Swiss Confederation—have still the effect of a revelation.[1]

Gierke immediately began his university work as a *Privatdozent* (approved lecturer but not on the university staff) with lectures on German imperial and legal history and German private law, as well as feudal law, the law of exchange and commercial law, and also on constitutional law. At the same time he started on the second volume of the *Deutsche Genossenschaftsrecht*, which was intended to complete that work.

The war of 1870 took Gierke again into the field. He shared in the campaign in France as a *Landwehr* artillery officer attached to a Hessian regiment. On occasions he commanded his battery and received on January 19, 1871, at Mézières, the Iron Cross for his services.

An invitation from the University of Zürich to succeed Alfred Boretius gave him great pleasure, but was declined owing to the fact that on May 9, 1871, at the suggestion of Beseler and on the proposal of the Faculty of Law, he was appointed Professor *Extraordinarius* (i.e. an additional professor and in this case at first not paid out of university funds) at Berlin. By January 1872 he was in the faculty as the most promising "of the Germanistic *Nichtordinarien*" (i.e. non-established professors). And his article *Humour in German Law*, published in July 1871 with Essays by other hands in honour of the old master of German legal science, Karl G. Homeyer, (and republished in 1886) began to make him known to the general public.

Then Gierke was offered an ordinary professorship at the University of Breslau, in succession to Otto Stobbes. The invitation was accepted and he was duly appointed in December, 1871. His removal to Breslau at Easter, 1872, was the beginning of the best and most fruitful part of his life. In April, 1873, he married Lili Loening, a sister of the two jurists of that name. There were six children, three sons and three daughters, of the marriage, and

[1] Ulrich Stutz. *Zur Erinnerung an Otto von Gierke*, loc. cit., p. xxv.

Gierke found unfailing happiness in his domestic life, and in intercourse with a number of his colleagues and their wives. He filled the office of Rector of the University in 1882–83, and in 1875 was appointed by the Faculty to attend the special General Synod at Berlin as the only representative of ecclesiastical law from Breslau. On that occasion he took an active part, but without marked success, mainly because his independent attitude—due to his strict sense of law—was unpopular in that period of the *Kulturkampf*. He was not greatly interested in ecclesiastical law, and in 1878 gave up his lectures on that subject to Siegfried Brie and took in exchange the summer course on general and German constitutional law. Yet this was at the very time when, for the purposes of his own work, he was absorbed in the writings of the mediaeval canonists, a study which justified the bestowal on him by the University of Breslau of the honorary Doctorate of Theology in 1911, at about the time when Berlin University bestowed on him the honorary degree of Doctor of Philosophy.

Following the example of Beseler, he began to give his pupils practice in research in the sources of mediaeval law, especially the code of law of Saxony. It is interesting to mention here that his first student was Heinrich Rosin, the first exponent of the federal state theory on the basis of Ihering's idea of *Zweck*, in opposition to the strong positivist doctrine. Neither then nor later did Gierke endeavour to form a particular school. It is important to emphasise this frame of mind; the effect of his inward conviction of the *Genossenschaftstheorie*—harmony between unity and plurality—was to make him take a quite impartial position.

The Breslau period was one of great literary activity. He wrote numerous articles for Holtzendorff's *Dictionary of Law* (*Rechtslexikon*), and much criticism, as, for example, his article on *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien*, published in 1874, which was reprinted in 1915 unaltered, and the controversy of 1883 with Paul Laband as to the latter's *Constitutional Law of*

the Empire. Both of these attacked excessive formalism and pleaded for a more pragmatic conception, as more in accordance with history and fact, and together they gave Gierke the right to be regarded as an authority on constitutional law.

Gierke's position in respect of commercial law was similarly established by some elaborate review articles, even before he gave special attention to it in connection with the revision of the Commercial Code and some articles in the Holtzendorff-Kohler *Enzyklopädie*.

He gave occasional lectures to large audiences, for example one in 1873 on *Das alte und das neue Reich*, which was an attempt to expound the theory of a new empire in the light of his *Genossenschaft* idea. And he was quite in his element when, as *Rektor* of Breslau University in 1883, he delivered a famous address on *Naturrecht und deutsches Recht*, which was published at Frankfurt am Main in 1883.

This latter lecture was a noteworthy result of the work on the *Genossenschaftsrecht* on which he was uninterruptedly engaged. The second volume of that famous work, published in 1873, contained only the history of the German conception of association. Nevertheless it was sufficient to mark out Gierke as being in his time the leading historian of the theories of German law. But his special quality, and one in which he has not up to the present day been surpassed, is that of the historical investigation of a mass of documentary and literary material with such accuracy and such historical understanding as to constitute a veritable triumph. The discoveries set out in this volume included the demonstration of the existence of a German corporative personality which endured through all changes. This involved a further extension of the plan of the work, for in order to deal adequately with that part of the history of the German "reception" of Roman law which related to the law of associations, it was necessary to include the history of foreign corporation doctrines—which would have been sufficient for the life-work of anyone else than Gierke.

One famous discovery of Gierke's was that of the writings and the theory of the state laid down in 1603 by Johannes Althusius, the precursor of the theory of natural right. Gierke endeavoured to estimate the importance of the Althusian doctrine to the theories of contract and popular sovereignty, of the principle of representation and especially of the idea of federalism and the legal state, by placing it midway between the mediaeval and the natural right theories of the state and determining its significance in the legal system. The whole of this research appeared in 1880 under the title of *Johannes Althusius und die Entwicklung der Naturrechtlichen Staatstheorien*. This book is the most important contribution of the nineteenth century to the study of the origin of the federal idea. It was republished in 1902 and again in 1913 with practically no revision. For a characteristic of Gierke's work is that on account of its magnitude complete revision would have entailed so many years' labour that he limited himself to making a few additions: he had no time for more, particularly as fresh fields of activity were always opening up before him.

According to Ernest Landsberg, this book of Gierke is "one of the most original and important literary historical studies that we possess."

In the following year, 1881, there was published in Berlin the third and the most important volume of Gierke's great work, the one entitled *Das deutsche Genossenschaftsrecht*, which marks the zenith of his achievement. The volume embodied the result of his researches into the theories of state and corporation in the ancient and mediaeval periods and their adoption in Germany. The central feature to many readers of this volume was the far-reaching and exhaustive examination of the mediaeval doctrine of Church and State. The late F. W. Maitland, of Cambridge, in his translation of a part of this work, published in 1900, gave in the introduction unstinted praise to the great German: "What is here translated is only a small, a twentieth, part of a large and as yet unfinished book bearing a title which can

hardly attract many readers in this country and for which an English equivalent cannot easily be found, namely *Das deutsche Genossenschaftsrecht*. Of that work the third volume contains a section entitled *Die publicistischen Lehren des Mittelalters*, and that is the section which is here done into English. Now, though this section can be detached and still bear a high value, and though the author's permission for its detachment has been graciously given, still it would be untrue to say that this amputating process does no harm. The organism which is a whole with a life of its own, but is also a member of a larger and higher organism whose life it shares, this, so Dr. Gierke will teach us, is an idea which we must keep before our minds when we are studying the political thought of the Middle Ages, and it is an idea which we may apply to his and to every good book."[1]

The French translation by Jean de Pange appeared in 1914, just before the outbreak of the Great War.

In the meantime Gierke's professional appointment at Breslau was drawing to a close. It was owing to the co-operation of Hermann Schulze that Gierke was appointed as Professor at the University of Heidelberg on July 11, 1884, and at the same time there was conferred on him the title *Geheimer Hofrat* (Privy Councillor). He entered on his new post in the winter term 1884–85. In his quality of *Ordinarius* at Heidelberg he became a member of the Baden Historical Commission. After leaving Heidelberg he published in 1888 an article on the *Badische Stadtsrechte und Reformpläne des 15. Jahrhunderts*, a contribution to the history of the law of family estates and hereditary right.

During his comparatively short stay at Heidelberg he was fully occupied, but yet found time to plan another great work, this time in the sphere of the existing law. He felt bound to appear as a dogmatist in order to develop the idea of *Genossenschaft*, which had been

[1] F. W. Maitland. *Political Theories of the Middle Age*. Gierke. Cambridge, 1922. Intro., viii.

advocated by Beseler and himself and was more and more being adopted in practice.[1]

For this purpose he broke off his historical studies and concentrated on the study of the *Genossenschaftstheorie* and the German administration of justice. This work, however, like others of Gierke, went far beyond the limits he had originally contemplated. In order to elaborate more fully the corporative idea and corporative rights, he found himself obliged to take into consideration the law of community, and particularly that of *Die Gesammte Hand*, in which, despite the closest union as to the plurality of the subjects, there is no unity either in regard to common property in marriage or in the public trade-association or anywhere else. The result was a book of a thousand pages, which appeared in the spring of 1887. It was of great and enduring value in the practical application of the *Genossenschaftstheorie*.

There now came a very important change in Gierke's academic career. In the summer of 1887 the question arose of the appointment to the professorship in Berlin from which Beseler had determined to retire. As Gierke had been an early adherent of Beseler's doctrine, it was natural for the latter to desire that Gierke should be his successor.

Although several candidates were proposed, the election of Gierke was so strongly supported, particularly by Heinrich Bunner and Friedrich Althoff, on account of his scientific importance and outstanding personality, that there could be no doubt as to the ultimate result. Althoff was so desirous that the Germanistic faculty of Berlin should not be overshadowed by that of any other university that he succeeded in securing Gierke's appoint-

[1] Alfred Schultze. *Otto von Gierke als Dogmatiker des bürgerlichen Rechts.* In: *Iherings Jahrbücher für die Dogmatik des bürgerlichen Rechts.* Band 37, Heft 4/6. Jena 1923, pp. v–vi, xix–xxii, xli. Emil Seckel. *Rede am Sarge gesprochen an Otto Gierke,* on October 14, 1921. In: *Deutsche Juristen-Zeitung.* Heft 21/22. Berlin, p. 713. "As a dogmatist he has built up a system of German private law and civil law, a system of proportionate construction, striving in its conceptional formation to clothe German legal principles in German and not in Roman garb."

ment at the end of June, 1887. At the same time there was conferred on him the title of *Geheimer Justizrat*, although his entry into office was not to begin until the winter term. Thus Gierke returned to the Faculty with which his career had started, and he remained there—for seventy terms in all—until the end of his life in 1921.

In regard to this long period passed in Berlin it should be noted that Gierke's activity was uninterrupted even in the vacations. Such of these as were not spent in his comfortable home in Charlottenburg, pursuing his historical researches, were used by Gierke primarily for activities outside the university. With his friends Adolph Wagner, Gustav Schmoller and Brentano he took an active share in the work of the *Verein für Sozialpolitik* as a speaker and Chairman of the General Assembly and as a member and vice-president, and he was a founder of the Evangelical-Social Congress. We may also note his great services to the *Berliner Staatswissenschaftliche Gesellschaft* and the *Staatswissenschaftliche Fortbildungskursus* (advanced course in political science). His other chief activity outside his university work was in connection with the Conference of Lawyers (*Juristentag*). As early as 1878 he drew up a memorandum in which he recommended an *imperial* system of examinations for the German legal profession, based on a course of study extending over eight semesters. Ten years later, in 1888, he contended with more, though not complete success, for the basic principle of the creation of voluntary corporations. Ten years later again, 1898, he was successful in carrying out an important reform in respect of the law of real property.

But his greatest triumph in this field of activity was the acceptance of a memorandum by the *Juristentag* and later the adoption by both Prussian and Imperial legislation of the principle for which that memorandum contended, namely that the state should be liable for damage caused by its officials in the exercise of the public duties entrusted to them.

He was also "reporter" at the *Juristentag*, took an active part in the discussions and was chairman of one of

the sections; he was a member of the permanent committee almost continuously from 1888, and from 1915 its chairman, and became an honorary member in the year of his death.

During his vacation he combined holiday tours with meetings with foreign jurists. Particularly we may note his address in Italian at the International Historical Congress at Rome in 1903. He paid only two visits to England, one in 1894, and the other in 1913 when he gave an address on the history of the "majority principle" to the International Historical Congress in London. Previously he went to America in 1909 and received the honorary degree of Doctor of Law at Harvard University, where he gave an English address on *German Constitutional Law in relation to the American Constitution.*

He was *Rektor* (Official Head, who holds the position for one year) of Berlin University in the year 1902–3, and received from two other universities, those of Münster and Freiburg in Breisgau, the honorary degree of Doctor of *Staatswissenschaft.*

During his year as *Rektor* at Berlin he gave two important addresses, one *Über das Wesen der menschlichen Verbände* in 1902, and the other *Über die historische Rechtsschule und die Germanisten* in 1903. In 1909 he gave another address, on the Emperor's birthday, on the *Steinsche Städteordnung* (Stein's Municipal Code). All three are closely connected with his own research work. The first was of great importance in its strong advocacy of his organic theory of association. The second was a vivid exposition of the struggle between the Romanist and Germanist historical-legal schools and his adherence to the latter. The third treated of the development of the association element in the new Prussian civic code as founded by Stein.

Gierke was frequently elected to the Senate by the faculties of the University. His personality, uprightness, independence and sense of justice were repeatedly successful in settling both material and personal disputes. He was three times Dean of the Faculty of Law.

His activity as a teacher continued its usual course, except that from the winter of 1897–98, in accordance with the new teaching regulations, he added lectures on the material and family law of the Civic Code to those on the Germanist law, on commercial law, and on general and German constitutional law.

The work which he had already started at Heidelberg on the fourth volume of the *Genossenschaftsrecht* was continued in Berlin in spite of his heavy tasks there. It was intended to contain the state and corporation theories of modern times, but he soon found it impossible to keep this within the limits of one volume and he therefore postponed the history of association in the nineteenth century to a fifth volume, which, however, was never written. And even in the fourth volume Gierke was not able to go so far as he had intended. Indeed the work made slow progress, and when in 1913 a new edition of the first three volumes was brought out, Gierke allowed at the same time the publication of a stately fragment of the fourth volume, headed by a particularly characteristic preface.

In 1888 his whole line of work was interrupted by the appearance of the publication of the first draft of the new Civic Code (*Bürgerliches Gesetzbuch*). Old as he was, Beseler once more took up his pen in opposition, and Gierke was so much opposed to it as to write a series of articles in Schmoller's *Jahrbuch*. But in these and in his book *Über den Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht*, published in 1889, he was not content with merely destructive criticism, but endeavoured to show what improvements ought to have been and could have been made. According to Ulrich Stutz, to this day certain sections of the book cannot be read without emotion, and none without instruction. Following on this he took an active part in the deliberations of the Prussian Economics Board on the agricultural portions of the draft, and in special enquiries, and delivered at the Vienna *Juristentag* of 1889 an address on the *Soziale Aufgabe des Privatrechts*. Gierke, although supported by the

Prussian Government, was not appointed on the second commission (to review the first draft) owing to the opposition of the South Germans, though he was brought later into the revision of the Commercial Code. Gierke himself admitted the second draft of the *Bürgerliches Gesetzbuch* to be considerably better than the first, yet he contended that it could have been still better and that there was a grave risk of sacrificing the essential validity of the law to the desire for unity. Although he was not successful in procuring a fresh revision of the Civic Code of law, his work was not in vain, for this struggle made him more famous than any of his previous achievements.

The phrase which Gierke applied to Gneist, that "he was a jurist, and a jurist from the crown of his head to the sole of his foot," may well be applied to Gierke himself. It is demonstrated by the fact that when the draft had once become law, Gierke accepted it loyally, though not uncritically. He did not merely adapt his university lectures to this subject, as others did, but reconstructed them wholly for the purpose. So great was his enthusiasm for reformation in the existing law that even before the appearance of the first draft of the Civic Code he had taken part in various discussions as to its formation.

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His small work on *Vereine ohne Rechtsfähigkeit* was published on the occasion of Heinrich Dernburg's professorial Jubilee in Berlin in 1900 and republished two years later. It treats of unions which are without legal validity and explains them as being ruled internally by corporation law, although not recognised as corporations by the Code, and perceives in them the victory of a living reality over the formal law which rejects free corporative formation.

The publication of his second monumental work, *Deutsches Privatrecht*, in 1895, testified to the importance which he assigned to the *Bürgerliches Gesetzbuch* as *lex lata*. It is quite possible that by this time Gierke had become somewhat weary of his long, toilsome researches on the one subject of the *Genossenschaftsrecht* and was inclined to

embark on another field of activity. So he made this great contribution to the *Systematisches Handbuch der deutschen Rechtswissenschaft*, edited by his friend Karl Binding. Gierke hoped in his *Privatrecht* to provide a broad Germanist basis for the new codification, the publication of which in its original form he hoped to improve by his new work.

The first volume of the *Privatrecht*, in 1895, was undoubtedly a brilliant achievement. Gierke attached the highest importance to a clear exposition of the subject-matter whilst not neglecting form, and to exactness of definition. Some theories discussed as general principles in this book were treated more philosophically and in more detail in his articles on *Recht und Sittlichkeit* which appeared in *Logos* in 1917.

The most striking chapter of the *Privatrecht* is that dealing with the theory of individual and union personality, in which he set out the results of the investigations already completed on the subject of the *Genossenschaftsrecht*, and anticipates those of his future work. To my mind the greatest achievement of this work is the argument for the federalistic relationship between private and public law.

The *Privatrecht* was followed by two more volumes, one on *Sachenrecht* in 1905 and the other on *Das Recht der Schuldverhältnisse* in 1917. The fourth volume, treating family law, was left incomplete. The contributions of Gierke's later life to private law are particularly noteworthy as establishing it on the Germanistic basis. Like his friend and colleague Dernburg, Gierke ended as a master of the new German civic law, but still as a Germanist. He reached the height of his fame both as a jurist and historian shortly before the Great War and was loaded with academic honours and distinctions.

Gierke, though grieved by the sudden and crushing defeat of his fatherland, for always at heart he had remained a Prussian and a nationalist, was yet undaunted. As Stutz aptly remarked of him, at the outbreak of the

war "*er fühlte sich zurückversetzt ins Jahr* 1870" ("He felt himself back again in the year 1870"). Too old to use a weapon, he wrote and spoke with the utmost enthusiasm on behalf of German "*Kultur.*"

Although it must be admitted that his writings and speeches in the war period savoured too much of sentimental patriotism, and cannot be reckoned as anything more than a very secondary contribution to his life's work, yet they include an article on *Recht und Sittlichkeit* in *Logos* for 1917 and a famous speech delivered on May 4, 1919, on *Der Germanische Staatsgedanke*, which may be numbered amongst his highest achievements.

His health began to fail visibly in the spring of 1920, but he made a partial recovery, and after the celebration of his eightieth birthday attempted to resume some of his work, notably that on the Saxon Code. Soon, however, he grew definitely weaker, and finally succumbed to an attack of congestion of the lungs on October 10, 1921.

It cannot be asserted that Gierke belonged definitely to any political party, although his whole development, his juristic-historical method and his mode of thought all tended to lead him more and more into the conservative camp. From inward conviction he remained always an adherent of constitutional monarchy, but for the sake of his own independence and because of his devotion to law as such he refused to pay allegiance to any one party.

Although not unwilling to submit to authority, he was never in favour of absolutism, and would not yield in the very slightest degree to anything opposed to his firm conviction as to what was lawful and permissible.

He never attempted to found his own school of jurisprudence and, although as a Germanist he had a large following, yet his theory of *Genossenschaft* was never universally accepted, on account of the too great prominence given to the organic conceptions of natural science.

To sum up as briefly as possible Gierke's fundamental philosophical ideas, I would quote the phrase of Professor

Seckel, "*Das Ethos ging ihn über die Zweckmässigkeit*" ("With him expediency must yield to ethics").

If we ask ourselves what was actually Gierke's greatest contribution to jurisprudence and *Staatslehre*, it was the freeing of these from the hard and fast dogmatic hypotheses to which they had hitherto been subject, and the setting out in great detail of a new method of approach.[1] His publications, of approximately 10,000 printed pages, form as it were a signpost indicating a way to bring about relative harmony between plurality and unity, as well as between the various branches of social science.

In his memorial address, Professor Seckel paid the following tribute to Gierke's work and personality: "His powerful intellect devised an internal synthesis of jurisprudence, philosophy, historical and political science. Not without good reason were four doctoral degrees conferred on him—those of law, theology, philosophy and political science; theology, philosophy and political science were all enriched by the fruits of his juristic production."

What he himself said of Althusius may with equal truth be applied to Gierke himself, that there was need of only *one man* akin to him in spirit to awaken to new life such a personality and such a life-work even after the lapse of centuries. In conclusion we may, with Stutz, apply to Gierke the poetic lines: "*Es kann die Spur von deinen Erdentagen, nicht in Aeonen untergehn*" ("The traces of thy days on earth will endure through many aeons").

[1] Professor Dr. Emil Seckel. *Rede am Sarge gesprochen an Otto von Gierke*, October 14, 1921. In: *Deutsche Juristen-Zeitung*, 26. Jahrg. 1921, Heft 21/22. Weimar, p. 712.

CHAPTER II

THE GERMAN *GENOSSENSCHAFTSRECHT*

§ 1

OTTO GIERKE'S publication of *Das Genossenschaftsrecht* in 1868 was undoubtedly one of the greatest contributions to German legal and political science. The founder of the Germanist *Genossenschaft* idea was his teacher Georg Beseler in his work *Volksrecht und Juristenrecht*, published in 1843, which, especially in its sixth chapter on *Das Recht der Genossenschaft*, laid the foundation of the conception of *Genossenschaft* in the legal sense that all German social institutions based on free associations were in their character as unions invested with independent legal personality, and that in the wider sense the commune and the state are included in this conception of *Genossenschaft*, but at the same time are something more and therefore are to a certain extent outside of the conception.

Communes and states in Germany evolved partly from the "involution of the association idea" and partly from that of the corporation and institution ideas.[1] They developed and maintained within themselves the elements of association to a degree which had varied greatly from time to time. These elements had almost completely disappeared in the eighteenth century and their revival was the characteristic of the nineteenth. Therefore state and commune came within the sphere of association in a dual respect, with regard to their organs and their internal organisation.

Gierke laid down the fundamental thesis that "the possibility of creating associations, which not only increased the strength of their contemporary generation but above all, by outliving individuals, united past and future generations—this gave mankind the possibility of development, that is, of history."[2]

[1] See my *Problem of Federalism*, II, pp. 663, 674–691.

[2] Otto Gierke. *Das deutsche Genossenschaftsrecht*. Berlin 1868, p. 1.

He saw on the one hand unity developing from multiplicity. "Out of the highest association which does not outlast individual life—marriage—grow families, races, tribes, nations, communities, states and unions of states in an abundant series, and no limit can be perceived to this development, unless perhaps in the far-distant future the whole of humanity be united into a single organised community, and give visible expression to the fact that they are only members of one great whole." But this movement towards unity was only one side of social progress. If it, and it alone, prevailed, then all spiritual life, all human progress, would cease; within every unity there must be plurality, within every uniformity there must be diversity—that is, there must be freedom.[1]

The conflict between these two great principles caused one of the most potent movements in history. The possibility of national well-being depended, according to Gierke, upon the extent to which the operation of these two principles could be made interdependent. The striving towards the harmony of unity and plurality was Gierke's interpretation of the actual history of mankind and his ideal of human organisation.[2]

He sought out the *Genossenschaft* basis of human association at every stage of history. In the early period, up to the coronation of Charles the Great as Emperor in A.D. 800, the basic form of all association was the free association (corresponding to the patriarchal popular liberty), which vested all law in the collectivity. But from the very beginning there set in the conflicting form of human association, in which one person was the tie which held all together—the association under an individual, patriarchal ruler. The early freedom of the people as the basis of public life gradually took a new form brought about by the contrasting principles of domination and service.[3]

Although the notion of state or community was not

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 1.
[2] Ibid., I, p. 2. Cf. Laski. *Grammar of Politics*, ch. I.
[3] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 9–12.

appreciated at that time, yet there were associations of free peoples which did not recognise the existence of any lord or of any higher association ruling over them. Each of these communities had a definite territory—a "land"; but as it had existed as a unit based on personal association before it occupied the land, so its nature was not determined by the area which it inhabited. It was a folk-community, not a territorial community.[1]

The folk-community was not an indivisible whole. Within it the clan and later the *Markgemeinde* were the forms of closest association, but between these and the whole community there were intermediate unions, which were organised as distinct associations and formed the basis of the whole organisation. These were, among almost all the Teutonic races, the "Hundreds"—not territorial unions in a geographical sense, but the oldest social and at the same time legal associations on a personal basis.

From these limited associations a wider and more comprehensive legal union was gradually developed by the enlargement of the relationships of the people.[2]

As the state conception developed, abstract ideas crept in; the right of an individual as an individual weakened and was replaced by an ideal conception of a transcendental and despotic state unity.

It was only by a very long process that the Germans reached the conception of the state, and distinguished the invisible unity of the nation from its plurality or from its ruler. And this unity was not something abstract, apart from and above the nation, but remained immanent in the nation and was recognised as the personality of the nation attained to legal form. It was not the absorption of the individual into the state, but his fullest and freest development which was sought for by the harmonious union of civic and individual freedom.[3]

These associations of free peoples gradually united, through necessity and the higher consciousness of racial

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 29.
[2] Ibid., p. 45. [3] Ibid., p. 46.

unity, to form either peaceful associations, or organisations for aggression and war.

In this course of development, when national affairs became important, a real *Bundesgenossenschaft*, which united a nation permanently into a higher unity, was established.

This national unity through union produced the right of the king *vis-à-vis* the right of the people, although "the right of the collective folk-community was stronger than the right of the king," and out of this associative constitution "a dominant head" emerged. As Gierke said: "In modern language, the people is no more the sovereign, for it has transferred a part of its sovereignty to the king."[1]

Along with the development of communal life and communal economics, the community of the village (the *Markgemeinde*), or free farmer-community, was formed and became the characteristic basis of the constitution of early Germany. Being a self-organised community, every political association was a *Markgemeinde* and every *Markgemeinde* was a political association.[2]

Though district associations and the nation itself formed communes (*Markgemeinde*), inasmuch as they possessed undivided common land, they were not economic unions. National and district communes were concerned with the purposes of the whole body as a unit, and in their care the rights of the whole collectivity became so pronounced that they took on the character of public property; with the development of a larger realm they passed into the possession of that realm and its representative, the king. The same fate apparently befell the hundreds. So there developed political associations of the territory, the hundred and the district, which were not communal unions and had no economic significance. On the other hand there were no purely economic associations such as were formed later. But yet there were in this period the beginnings of a differentiation between the political and the economic communes.

[1] Gierke, *Das deutsche Genossenschaftsrecht*, I, p. 48. [2] Ibid., p. 80.

The process of amalgamation of associations, whether into a real political union or into an economic one, started from the basis of personal union. But even in the purely political unions which arose in consequence of the collapse of the village communities and the separation of the economic and political associations, the personal connection declined in importance as compared with the union created by connection with a definite territory. The closer the union, the quicker was the change; the hundred, the district, the tribal and national association underwent successively (*stufenweise*) the transformation. And in them all it was not simply the fact of a title to the land concerned, but also the fact of mere passive connection with it, which constituted a claim to the protection of the appropriate association and imposed corresponding duties.[1]

Whilst the oldest constitutional institutions of the German people thus developed out of the association, there was by their side a contrasting form of human combination which Gierke called the *Herrschaftlicher Verband*. He defined this as, in its pure form, a community in which one individual is what all the members are in the association, i.e. the ruler, and embodies in himself the collective legal unity of the union.

From very small beginnings this union under a lord (*Herrschaftsverband*) gradually covered the whole life of the nation. But it enters into the legal history of the association only in two respects, firstly so far as it came into conflict with and destroyed the old association, and secondly so far as it accepted for itself the idea of association and was thereby modified and finally dissolved. The "idea of associative self-administration" was deeply rooted in German legal conceptions and, in contrast with the Roman system, the idea of lordship never won a complete victory; it compromised with that of association.[2] Gierke thought that a characteristic of German law was an inclination to combine antithetical ideas, whilst

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 86–87.

[2] Ibid., p. 100.

Roman law tended to emphasise their antithesis. German legal thought was concrete, always finding a relationship between dissimilars and diversity among similars, and recognising alike in terminology and idea the relativity of all human affairs.

The Christian Church exercised great influence upon the whole German legal development and particularly upon the nature of association, but the Germans, who saw in the Church only the terrestrial part of a great heavenly kingdom, organised on the model of earthly kingdoms, applied to this kingdom of God and the Church only the legal ideas of the lordship and not those of association.[1]

The Empire of Charles the Great in many respects answered to the modern idea of the state more nearly than did the feudal monarchy or even the Empire of the fifteenth century, the reason being the remarkable way in which it combined all the various preceding developments and by a higher unity brought about some reconciliation of conflicting contemporary ideas. But the reconciliation was only superficial—the unity achieved was not an inevitable idea held by all the peoples of the realm; it was only the powerful personality of a great monarch. And the conflict between Church and State for rulership of the world was the dominant fact from this time onwards.

The conflict between domination and association resulted in a new creation, that of feudalism, of which the characteristic features were derived from that fusion of domination and service which became the driving and creative thought not only in law, but also in the ordinary external and internal life of the nation.

Gierke observed that in all the religious beliefs and practices, in all the poetry and ethics of this period, all relationships, of men to God, of men to men, and of men to the world, were considered as those of service, and expressed in terms based on the idea of the fidelity of a servant to his master. "Self-surrender, service, obedience, fidelity" on the one hand, and "favour, protection and

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 144–146.

benefit" on the other, were the characteristics of these relations.[1]

This domination and service relationship resulted in a hierarchical system of very diverse vassal unions, each of which was through its head member of a wider union. Gierke asserted that in the feudal system all law was of the nature of contract and private law, and all legal relations were relations between individuals. The characteristic of the association under a lord was that the juristic unity, which was represented in the pure association by the assembly of all the members and in the union under a lord by the lord alone, was shared between the lord and the community in such a way that the lordship appeared to be the original and the community its derivative—as soon as the association merged into a *Herrschaft* union the associative collective law was derivative.

In the village and free commune (*Mark*), where the economic side of the community was predominant, a large measure of association was maintained; the larger and especially the politically important associations within the nations disappeared to a much greater extent. But even in them the feudal system did not wholly or everywhere destroy the idea of association.[2] For that system was not completely applied even when at its height. It was only in theory that all power and all right came from above; actually men always recognised an "original right" at the side of "derived right." Lordship and service was never the sole constitutional relationship; the equal and reciprocal relationship of associates possessing completely equal rights was constantly maintained, or developed anew.[3]

Then fresh vigour was given to the *Genossenschaft* by the rise of a new thought which was more powerful than the idea of feudal monarchy or universal hierarchy—that is by "the idea of free union," defined by Gierke as one which taught that an "association did not owe its existence solely to natural interdependence, or to the external unity

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 153.
[2] Ibid., p. 214. [3] Ibid., p. 220.

given by a lord, but the real basis of its existence as a union was the free will of the associates."

This idea worked as both a "creative" and a "transforming" force, calling into being quite arbitrarily formed associations, and combining with the older principle to change the nature of the natural or artificial unions.

In the course of this development two groups of associations became sharply distinguished, the one based on union by free will—of this the old Germanic gild was the prototype—and the other on union by an outside will quite independent of the free will of its members.

In contrast with state and community the gild was an association, a free association, "a union for a determined purpose," and every German gild had religious, social, ethical, private law or political aims. Even when later specialised classes of gilds were formed—spiritual and temporal—and among the latter protective and trade gilds developed, the difference was only in respect of the main purpose; both old and new gilds developed chiefly as associations for common interests varying with the different vocations of the citizens. They remained unions for all the purposes of life, but the vocational interests of the members predominated. Above all they were associations for the exercise and maintenance of political privileges.

The great majority of citizens, however, who depended on the growing trade of the towns, regarded trade interests as the most important concern of the gilds, and as these combined only those concerned in the same trade, they became real trade gilds.[1]

Gierke maintained that side by side with the development of the economic association, the idea of unity introduced into the town communities in the last two centuries of the mediaeval period a new form of union by developing some favoured communal associations into free municipalities, thus rejecting the doctrine of the endurance of Roman municipal institutions, and also the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 245.

idea that the basis of the German city-system was to be found in German manorial law.[1]

The middle of the twelfth century was the approximate date at which there began to develop a German legal conception of the municipal council as an institution associated with municipal freedom, and consequently the formation of such a council, where it did not exist, became one of the objects of the growing civic movement. The progress marked by the establishment of the council was due to the fusion of the principle of the arbitrary union with that of the old association.

The council was considered as the representative of the commune and acted and ruled "internally and externally" in the name of the commune, e.g. of the town; but at the same time it was not a mere plenipotentiary of the community for specific purposes, but gradually raised itself to the position of a "real unitary municipal government"—it became a "state authority in the modern sense." This was made possible especially by the fact that it had rights of legislation and of administering justice, in addition to its supervisory powers.[2]

The Christian Church, as long as it was unitary and general, combined in its formal constitution and in its whole nature Roman and Germanic elements and added to them the theological-hierarchical conception also. The Canon law which resulted from these three factors was on the one hand strongly influenced by German popular law, and on the other in sharp antagonism with it. There was a remarkable parallelism in the development of temporal and spiritual institutions, and at the same time a bitter conflict between them.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, pp. 249–251. Starting with a comprehensive study of the three German cities—Köln, Magdeburg and Trier—in which there were completely free communes even in the period of episcopal rule, Gierke reached the conclusion that the basis of that freedom was the old German free association which was developed into a municipality by combining the idea of the free union with the old principle of the *Mark*.

[2] Ibid., p. 277.

§ 2

No century has been more strongly characterised by the dissolution and reconstruction of political organisations than the twelfth century, which witnessed the fall of the Hohenstaufen and the great Interregnum. The feudal empire hastened to its collapse; despite apparent successes the same fate threatened its determined rival, the Church.

The idea of loyalty and service, which bound all the members of the Empire and Church into a highest unity had lost its power over the German spirit, now becoming self-conscious, and was replaced by a powerful self-determination. The German race was coming of age, and began to desire to determine for itself its purposes and to seek in its own mind the reasons for its convictions. This process, after a preparatory period of three centuries, produced "the last and greatest stroke for freedom"—the German Reformation, which for long seemed to have exhausted the productive power of the German people, which for the next three centuries left spiritual and intellectual development to a few outstanding personalities, the development of political ideas and practice to the princes, and of active self-government to the people of other lands.

In the sphere of law and constitution, until the completion of the Reformation, the free association in its mediaeval garb, i.e. the union or corporation (*Einungswesen*), corresponded to the development of the nation; it was the dominant principle of the period, just as feudalism had been in the past and authority was to be in the future.

It is true that the old unions continued to a large extent, and that at the same time there arose a new principle—that of territorial rule—which was also hostile to the feudal principle and in the end triumphed over that and the corporation principle as well. But it was the corporation which alone at first showed creative power,

gave the Germans new conceptions of law and breathed fresh life into the old ones. For Gierke asserted that "the system of free associations turned into a system of privileged corporations."[1]

On the difference between the two periods of the association movement Gierke laid great stress. The corporative egotism, the quest for privilege, the exclusiveness and shortsighted narrow-mindedness were the mistakes of the corporations as they degenerated, and had to be corrected by the territorial governments as inimical to the state. These defects cannot be attributed to the corporations of the thirteenth and fourteenth centuries, although their tendency to comprise the whole life of their members, thereby making themselves "states within the state," their division of the people by vocations, thereby dividing the nation into social classes from which the rural population remained excluded, and the making of their members into a privileged class—these things caused their ultimate collapse. But before this happened their task had been done. In the time of the development of the power of the German people the associations were inspired not by egotism but by the sense of community. To its members the association was not merely a means for the better attainment of individual purposes, but it formed a higher, ethical community in which the individual gave up a part of his personality for the advantage of the whole.[2] So that privileges were a means to the purposes of association; association was not a means to the exercise of privileges.

Instead of stereotyping its traditional forms the movement adapted itself to every need, and instead of restricting the enfranchised population it constantly raised fresh grades of people to freedom, self-administration and power.

Gierke asserted that "the association bore to individuals the relationship that is borne nowadays only by the family, or the state."[3] But the association had not yet shown the later tendency "to act, so far as possible, as

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 298.
[2] Ibid., p. 298. [3] Ibid., p. 299.

being sovereign and independent of external authority"; on the contrary, it strove to form a wider union with other associations, "in which, again as a member of a higher unit, it willingly sacrificed a part of its own independence, because its outlook was sufficiently wide to recognise the advantage that would accrue to all."

The movement towards associations in the Middle Ages contrasted therefore with the later corporation movement by an inclination towards the enlargement and extension of the unions, and by establishing wider unions over and above the narrow ones, and by setting up "leagues" of unions or comprehensive unions comprising a number of separate specialised unions.

But Gierke was strongly of opinion that it is not possible to talk of a "state-opposed" tendency of the association, partly because a state, to which it could be opposed, scarcely existed and partly because it was the association itself which gave birth to the oldest state communities (towns, rural communes, federal states) and co-operated in the formation of the territorial states.[1] In fact the union came near to restoring to the Empire in the form of a federation the territories (*Länder*) lost by the break-up of the feudal system, and such measure of imperial unity as existed at the end of the fifteenth century had been saved by the power of the idea of union.[2]

The whole modern conception of law and the state was developed from mediaeval ideas by the towns in the thirteenth and fourteenth centuries. In the towns the self-government and correspondence of civic rights and duties which the modern age has tried to realise in the state and to re-establish in the communes were recognised as the highest principle, and were often fully attained.[3]

The towns claimed full right of self-administration and jurisdiction over their areas, and this naturally led to the formation of "town territories." As juristic unities they

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 303.

[2] Ibid., pp. 303–306.

[3] Ibid., p. 309. Following the example of the Italian towns, the free cities on the Rhine, Danube, Weser and Elbe strove to become true republics.

held independent rights of the most diverse kinds, not only *vis-à-vis* their lords but also *vis-à-vis* other associations, unions and persons outside themselves.[1] They enjoyed complete freedom of trade and legal capacity according to territorial (*ländliche*) law in all spheres of public and private law.

Gierke assumed that the law and constitution of the towns developed from the old Germanic association after it was enriched and modified by the acceptance of the principle of compulsory union—that is to say, there was a synthesis of the idea prevalent in the community that the thing itself was the representative of all law with the idea prevailing in the gilds that some personality was the representative.

In the towns a more and more complete unity was sought and found, and municipal law and citizenship became more and more closely identified with municipal territory and the body of citizens. The consciousness of this unity existed in the second half of the twelfth century; it found expression in the elevation of the ideal conception of the town into a legal unity,[2] possessing "a more or less complete freedom of its territory and inhabitants with regard to person and property, a special town jurisdiction, and self-administration."

This legal sphere was limited to a varying extent by the rights of the head of the Empire. In regard to the legal sphere, so defined and limited, Gierke noted the following circumstances of subjective relationship:

(I) Its real subject was "the town considered as a collective personality."

(II) The collective population of the town, including visitors and non-resident citizens, took a passive share as members of a great protective association. Their discharge of civic duties gave them their claim to protection.

(III) The "true and actual holder of civic right" was "a narrower association composed of those possessed of full citizenship."

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 309–310.

[2] Ibid., p. 311.

(IV) These rights were exercised not by the collectivity but by its organs, and the chief organ of the community was in all cases a council with a "mayor" at its head.

On these assumptions all private and public law common to all citizens was concentrated in the conception of the "town." The town was "the holder of all supreme rights, externally and internally,"[1] and was the territorial head of its collective territory and the private law owner of all streets, public buildings and common lands.

Both within and without its boundaries "the mayor and council gradually came to represent the town as its organ." But the community of citizens with full political rights by no means handed over the exercise of power entirely to the council, but to a large extent co-operated with and controlled it, though in course of time its competence was restricted. Originally it was the highest court and the legislative body; later its concurrence was frequently required for new ordinances, alliances, imposition of taxes, and other specially important matters; finally, where the council was not self-constituted, the body of citizens elected it. But in all these respects the council sought to make itself independent, so that antagonism frequently developed between it and the general body of citizens. The result was the formation of a smaller and a larger council, which were only the two parts of one and the same state organ and jointly represented the town, but the larger one was rather the representative body and the smaller the executive authority. Besides the council there were large numbers of town authorities and officials, who grew more numerous as the towns acquired new powers and the machinery of administration became more complicated.

The bodies of citizens with full political rights took in the course of time a more or less aristocratic character. The citizens carried on trade and industry, possessed much landed property in and out of the town, invested profits in more land, and so even in the towns made

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 312.

ownership of land the essential qualification for citizenship.[1] And even where no knightly or old burgher class existed, as in the towns originally established for trade, like Lübeck and Hamburg, a similar citizen class rose out of the rich land-owning merchants. But as a purely merchant class developed with the growth of capital other than land, and a class of free artisans developed with the liberation of manual labour from servitude, the majority of the town population, though excluded from membership of the body corporate, yet came to regard itself as part of the civic community, and although there were towns in which an aristocratic form of government or important political privileges were maintained, yet there generally grew up a unitary citizen class and unitary associations of citizens.

Thus with the expansion of trade the development of the town as an association, and the growth of a new legal idea, were fully manifested. A great association of citizens, united by equal rights and duties, which was at once a commune and a voluntary association bound together by oath, and reproduced the oldest German institutions in a modernised form, was the "holder" (*Inhaber*) of the town.[2]

As the town in its collective constitution displayed the true nature of a state community, it permitted the development of true independent associations among the citizens; and this freedom of association within the German town was the characteristic which distinguished it from the πόλις of Greece and the *civitas* of Rome.

So Gierke held that, as the town did not absorb the personality of individual citizens, it acknowledged in the separate association an independent individual having the same character as the town itself displayed in government, its constitution being based on the will not of the town but of the union, and its own legal life, self-jurisdiction and self-administration being carried on independently of the town. With the completion of the town constitution and the emancipation of personality from the ownership

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 320. [2] Ibid., p. 327.

of real property the structure of the citizen body had a purely personal basis. But in some of the older and larger towns the earlier association structure continued instead of, or along with, the gild structure.

The older communities such as "neighbour, village and peasant communities" maintained themselves even after the rise of the town constitutions as distinct corporations, which on the one side were parts of the municipal organisation but on the other hand possessed rights of their own as associations, and so were of legal as well as of military, religious and economic importance.[1]

From the thirteenth century onward the merchant gild became increasingly important and underwent great development. Domestically it was one of the chief factors in municipal life and in the civic constitutions. Standing midway between the old "protective gilds" of citizens and the craft unions, it shared with the latter the tendency towards a preferential trading position and many vestiges of the time of incomplete freedom, whilst it approximated to the older citizens' gild in its freer position, wider autonomy and the possession of many political privileges. But, like both, it was a gild, and therefore a permanent union covering the whole life of its members. Especially was it of political importance. In the German towns the merchant associations were, in both early and later times, integral parts of the constitution, and had important functions in respect of the formation of the town council, of defence, police and justice. Abroad German traders formed permanent gilds or Hanses, which acquired trading premises and obtained from foreign rulers and municipalities trading privileges and gild franchises. Then all the Hanses in any particular foreign town combined, whilst retaining their individuality, into a collective body which represented all the German traders there. Thus there grew up the great German Hanse with its principal centres in London, Wisby, Novgorod and Bruges.[2]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 333.

[2] Ibid., pp. 349–350.

The artisan class, which only slowly emerged from servitude, was very late in adopting the idea of union, but once it had done so it showed in the most remarkable manner the power of this new principle. The craft unions brought about for the first time in history the recognition of the "right and honour" of work. They were based on freedom, not the arbitrary freedom of work which was the result of unrestricted competition, but freedom checked by the voluntary acceptance of the rules of association and regard for the common good, instead of by at first the rule of a lord and later by monopoly.[1] The craft-gild was a voluntary (i.e. arbitrary) association which like other gilds embraced the whole life of its members, as the family and state does to-day, and as a rule was concerned with the carrying on of a particular industry or trade as a common responsibility and as a common right. This common right had, to Gierke, originally not a private law but a public law character; it was, and was called, a public law function.[2]

During the period up to the Reformation the new ideas of union and association led to the voluntary formation within the Church of all kinds of religious corporations; and the same movement showed itself in the formation of the universities and colleges, which followed in their organisation the same lines of development.[3]

In regard to the nature and content of the mediaeval association, Gierke pointed out that the personality of the individual member took the first place, whilst in modern associations the object is the first consideration. The strict application of the gild principle required that every individual should belong to only one association of the same kind, and through its medium become a member of a higher and wider union. The individual took his place in the family, the family in the professional gild, the professional gild in the community, the community in the territorial state and empire. But the possibility of the exercise of more than one profession necessitated some

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 358–359.
[2] Ibid., p. 360. [3] Ibid., pp. 426–439.

modification of this. There was no very clear line of demarcation between contractual relationships which created a sum of obligations, and the associations which arose from them or preceded them. Even when Gierke wrote, the line between a company based on contract and a corporation was very uncertain, and in the Middle Ages there were many intermediate forms. In the sphere of private law there was a definite distinction between a society and a gild, and in regard to commercial law the existing kinds of societies (joint trading or shipping companies) were quite different from the gilds or associations. But in the sphere of public law the intermediate forms between the political union and the union based on contract or treaty were innumerable. In general the associations of this period which developed from unions for political purposes were mostly merely unions for specific purposes (*Zweckvereine*), although even with them there were signs of the same generalising tendency as in the mediaeval association.

So the political union emerged. Gierke asserted that "the political union extended the principle hitherto operative only in the town community and the individual professional classes, beyond the city walls, beyond class limits, to the country and the Empire. As it produced an ever-widening circle of confederacies and other unions, with an evident tendency eventually to reconstruct from these elements the ruined Empire itself as a great federal community, it reached the limit of what could be accomplished in the Middle Ages in the upward constructive effort of the nation."[1]

Despite the great diversity of political unions and the changes which even one and the same union underwent in the course of centuries, it is possible to find a common basis for them and lay down some general principles.

First the political union was set up exclusively by the "free will of the parties to it." Secondly, all members were on an equality, all shared equally in the fulfilment of the purposes of the union. This principle of equality

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 458.

had the effect that at first unions were between corporations and individuals of the same status, i.e. they were between cities, or gilds, or craft-gilds, or monastic orders, or princes, or nobles, or prelates. This was not an abandonment but a continuation of the old principle. The parties to these unions were no longer the individual citizens, or the communes as totalities of citizens, or the individual lords or nobles, or their associations as bodies of private persons, but towns, corporations and lords were bound together as holders of a definite territorial lordship or realm, i.e. as "political units or power."[1] So there was no inequality within the union. Those parties to the union who were not of the same status could only be "protected members." The term "estate" came to be used for each political unit of its kind, and these estates were the elements out of which the association of the territorial state (*Landschaft*) or the Empire was built up.

In substance all political unions had this in common, that they established between their members a community of peace, law and general interest, but this community differed both in extent and working according as it applied to internal or external matters or both.

The means adopted were very diverse, and so the unions took a great variety of forms, from simple treaties to complete federal organisations. But all such unions were of a temporary character, even when they developed elaborate organisations.

Gierke found it "difficult" to form any opinion as to the legal nature of these unions, as to whether the agreements and treaties by which they were formed were "constituent acts" or "only a manifestation of the collective will of an already existent association." And when one realises the almost inexhaustible number of combinations made possible and actually realised owing to differences in the origin, membership, purpose and form of political combinations, it is easy to form some idea of the multiplicity of kinds of associations and unions in the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 460.

Middle Ages. Some of the chief forms Gierke examined in detail.

The unions of towns, which were not only the first to apply the principle of union in the sense of political alliance but formed a nucleus for unions of the other estates, developed mainly in two directions, according as they were concerned primarily with commercial interests or with the relations of the towns to the princes and the Empire.[1]

The German Hanse, the final product of the many-sided movement towards union among the North German cities, had practically no direct relationship to the Empire or any territorial state; it was in fact a commercial republic, although most of its members owed some political allegiance. It was historically unique, and is of peculiar interest in the history of law.

Historically the Hanse League was the result of the combination of two factors—the union of the merchant gilds abroad and the alliance of the commercial towns in Germany itself. It was considered not as a "mere collectivity but as a subject of collective right"; that is, as a great association having rights and privileges of its own and represented by the gilds at home and abroad as its members.

Gierke was of opinion that no very satisfactory answer could be given to the question of the legal position of the Hanse from the fourteenth century to the Thirty Years War. It could be argued that it was never a legal creation but only an historical phenomenon. Whilst from the standpoint of history and ethics one could recognise that in all the members of the Hanse there was a living and enduring idea of unity, juristically the whole phenomenon resolved itself into a complex of distinct legal relationships and of individual rights and duties. But so "atomistic" an explanation cannot be satisfactory. So creative and definite an idea, which shaped the individual legal relationships with such compelling force and made them into a collective unity, must be accepted as a "legal conception,"

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 436.

which gradually arose, developed unnoticed and underwent frequent change, but remained the same and took strong hold upon the legal consciousness of the people.

But Gierke said "this legal idea, which admittedly represented only one side of the political, economic and ethical basic idea of the Hanse, was nothing else than the idea of an association of all commercial communities of the Lower German races and law, based on voluntary union."

The basis of the whole union was and remained the free will of the members to an extent which to modern ideas is hardly compatible with the federal nature of the whole body.[1]

The Hanse was the outstanding example of a league of cities, but there were others, of which the chief was the great League of the Rhine cities formed in the middle of the thirteenth century.

Along with the town leagues, which were the first to demonstrate the strength of political union, there arose among the other estates the same kind of unions which with common resources tried to serve common interests and to form special unions for the maintenance of peace and their legal rights. Unions of nobles, communities of knights, unions of clergy, and peasants' unions were formed to act in political affairs as collective independent units.[2]

The political unions not only aimed at the common protection of the collective interests of the respective classes, but extended to the public interests of the Empire or the territories (*Länder*). Though their activities were mainly in respect of estate interests, there was one point in which they early served a public, imperial and territorial interest; and that was the establishment and maintenance of territorial peace and order. They were therefore of great importance as re-creating that unity, superior to the estates, which had almost entirely disappeared.

Considered from the legal standpoint all these peace

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 472.

[2] Ibid., pp. 487–506.

unions were not mere treaties, as their form and particularly their limitation to a period of years would suggest, but contained the basis of a peace association, though effective only in special matters. Just as the federal community differed from a single treaty alliance, so these territorial peace communities differed from peace and conciliation treaties. Their object was not the determination of the legal relations between the parties to them, but the establishment—if only for a limited period—of practical rules for a prescribed number of persons and a prescribed area.[1] Thus the political union was valid more and more as a form of state union.

After the downfall of the feudal system the ancient view of the Empire as a great *Herrschaft* union in which services were graded from the highest to the lowest ranks was replaced by the different idea that the Emperor was only the elected ruler of an artificial peace and legal association based on the union of the estates.[2]

Along with the principle of union the new idea of a state authority began to prevail. As early as the thirteenth century the territorial supremacy of certain individual members of the ruling class began to take the form of a distinct and unitary power over a defined territory.

Gierke asserted that from the first it was clear that "the union of the Empire could not be a confederation of the whole nation, but a confederation of individual estates."[3]

In the year 1495 the confederation of the estates was set up under Maximilian. Thus the Empire was constituted as a great peace union of perpetual duration in which every quarrel between the members was prohibited, breach of the peace was threatened with the ban of the Empire and fine, and the Emperor was recognised as the head, and the individual imperial estates as members, of the union. The imperial and estates supreme court of the Empire was set up as the tribunal for the maintenance of peace and law within the new imperial union. A yearly

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 505.
[2] Ibid., pp. 508–509. [3] Ibid., p. 509.

assembly of the estates of the Empire was to be held; a division of the estates created for administration and taxation circles of the Empire which were in fact smaller peace unions with elected circle heads and officials.

Therefore the Empire was not a true federal state, but a great peace union of the estates. But that union would not have come into being had there not existed by the side of the actual imperial constitution a federal constitution in that part of the Empire in which nobles and towns, as well as the princes, still had influence. This federal constitution was not simply the predecessor and instrument but was an integral part of the imperial constitution.[1]

The power of union had created a state community in the mediaeval city, and the political alliance had created above the towns unions with all the importance of a state, but none of them, and least of all the Empire, had led to the formation of a real territorial state.[2]

Gierke observed that in fact a territorial state formation based on a pure "community" constitution was impossible for the greater part of Germany, because the rural population had no share whatever in the movement towards union. With the separation between the towns and the provinces the mass of the peasants sank into greater servitude; the free rural communes remained old-fashioned associations mostly without influence on the march of events. In exceptional cases some part of the peasantry on the coast or in the mountain districts, and in a few inland districts, succeeded in developing the association-constitution into a communal constitution, to maintain or strive for independence. This movement led to the establishment of the territorial communes (*Landesgemeinde*), which made those ideas which underlay the municipal constitution into the basis for a state union embracing the whole land.[3]

These territorial communes strove, like the towns, to widen their borders, and succeeded, where the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 512.
[2] Ibid., p. 514. [3] Ibid., pp. 514–515.

town leagues had failed, in founding a true federal state.

The general development was on the contrary decisively towards the victory of the territorial power and the formation of territorial states. In these the individual power of the territorial lord, which made itself into a state authority, was an especially creative force and ultimately came to be the sole embodiment of the idea of the state. But this was only the ultimate result; the self-activity of the people originally participated in the formation of the territorial state. For as the formation of estates outside the towns brought an advance in the direction of unity, the new territorial state came into being in the first instance as a community composed of the territorial lord and territorial commune.

Gierke pointed out that there were three different legal creations the nature of whose unions had directly conditioned the development of the territorial state. These were the "free rural commune, the federal state and corporations of territorial estates."[1]

It was the *Land* which acted externally as a unitary power through its representatives, carried on war, concluded alliances and treaties, acquired rights and undertook duties; it was also internally "a state unity" possessing property, having a budget and military and financial systems, legislating, interpreting and enforcing the law. All the smaller divisions were merely dependent communes, of political importance chiefly as electoral bodies. At the head of the territorial commune were one or more magistrates, elected annually, whose status and authority gradually approximated to that of the town burgomasters.[2] In the fourteenth century there grew up as in the towns a council which as an administrative authority represented the commune in the less important external affairs and internally exercised at first police powers and could legislate for some small matters, but in the fifteenth century acquired jurisdiction in criminal cases and finally in civil cases and voluntary arbitrations.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 515. [2] Ibid., p. 519.

Gierke stated that a federal state unity of several provincial communes organised into a state community arose first in the part of Friesland which had kept its independence, in that the old annual provincial assembly in Upstallbom, originally attended by all freemen and then in the main only by judges and clergy, was transformed into a regular representative assembly of the United Netherlands.[1] The whole of Friesland was then considered as a confederation of the separate territorial communes, based on voluntary union for the maintenance of peace; the assembly was regarded as the regular congress of the union, and the officials, judges and prelates as the plenipotentiaries of their territories.

But although this federal constitution and the formation and internal development of the individual territorial communes strengthened the voluntary association system of Friesland, and thereby freedom was kept much longer than elsewhere among the Germanic peoples, it fell at last owing to external attack and internal rivalries. In the fifteenth century the aristocracy of the leaders became so firmly established and powerful that the country was shattered by their quarrels and split up into factions and separate leagues; one such party secured in 1454 the selection of an hereditary prince who was recognised and invested by the Emperor.

Nevertheless the federal idea of the Frisians and Low-Germanic people was important, as it influenced the later formation of the federal state of the Netherlands, which was to make Holland the freest community of the time, and the form of the federal union of larger territories was in the two countries the starting-point of constitutional development.

In Switzerland, on the contrary, a republican federal state was formed out of the political union of small or large provinces and towns.

Gierke pointed out that the difference between the confederated unions or *Landesfriedensverträge* and the Swiss union was that "the central point of the latter

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 530.

remained always a union of *Länder*," and it was therefore based on *Land*, and not upon estates.[1]

In 1515 it was laid down that in matters which concerned the honour and welfare of the confederation and did not conflict with the actual pacts or customs the minority of the estates must accept the decision of the majority.[2] Thus without a unitary constitution, federal property or federal budget the confederation formed a powerful unity, both externally and internally, although it lacked the legal form of a state.

So Gierke concluded that as on the one side the federal unity developed gradually to be an actual state authority and on the other this unity developed more a single bond uniting all its members with equal rights and equal duties, it was possible for a living modern federal state to grow up directly from the old basis of the mediaeval form of union.[3]

The corporation of a territorial estate was as important a source of the German idea of the state as was the territorial power. The former meant the transformation of a lordship into territorial supremacy; the latter meant the organisation of the territory by the union of the estates into associations. In these circumstances, as Gierke pointed out, the territorial lord and the territory were two co-ordinate holders of the state right and together represent the German state as it emerged from the Middle Ages.[4]

From the thirteenth century in all territories there were two contemporary tendencies which though in frequent conflict yet by this very fact hastened the attainment of the common goal, the formation of the state. One of these tendencies was the effort of the princes to become

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 532. The federal treaties were of very diverse content. The obligation of mutual support in the event of war, the maintenance of peace among the members, provision for arbitration, and some forms of sanction were common to all. And despite inequalities and divergences between them, the territories and towns regarded themselves more and more as confederates and in the joint assemblies built up a federal law and federal legislation.

[2] Ibid., p. 533.

[3] Ibid., p. 534.

[4] Ibid., pp. 534–535.

territorial lords, a process which gradually effected a complete concentration of the right of dominion in a single hand (*Landesobrigkeit*).[1] The other tendency was towards the maintenance of that independence which had hitherto been active in the general and special assemblies and in the associations and unions under lordship; and this movement finally brought about the combination of all the political bodies pursuing this purpose into territorial corporations of the various estates. In the association thus formed there grew up the idea that it was "not merely a sum of individual persons with a sum partly of general and partly of special rights," but that it was a unity which represented the *Land* itself. It called itself the *Land* or common territory (*gemeine Landschaft*), meaning thereby the whole body of legal, personal or territorial groups, organised into a living whole body of independent political units or estates which had an association character, whilst the individual subjects or citizens of the estates participated as "protected members."

Thus, though these two institutions—territorial lord and territory—were independent powers, the "indispensable necessity of common working" and the correspondence of their rights and duties inevitably led to the recognition of a common source and therefore of a "common unity" between them. And under the influence of the conception of a common good which each emphasised and each represented, there appeared the larger conception of the "territory" as a "state."[2]

In the early times of the "estates" system there was no idea of the *Land* as a "state," that is, of a "unitary community" in the municipal sense of the term. "Lordship" and "territory" were two parallel legal institutions which were bound together by multifarious legal relations, but were not members of a higher unity distinct from them.[3] The "lordship" consisted of the lord as its possessor and the land and people as a union to which the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 536.
[2] Ibid., p. 537. [3] Ibid., p. 572.

lords' servants and tenants were completely bound but others only in so far as they were in a special legal relation to the lord. But through the development of the active rights of the members it became "an organised territorial community" manifested by the assembly of its full members, as in the case of the towns.[1] With full right the collectivity of the estates could act in the name of the *Land*. With this representation of the common land and people, the estates stood not only for the protection of the whole land but for the representation and protection of every individual inhabitant. Their activity not simply in their own but in the common interest shows that when the organisation of the territory on the basis of the estates was at its height, the conception of those estates as privileged corporations distinct from the territory was altogether alien to it.

The idea of representation of *Land* by estates was fundamentally different from the modern system of representation. Firstly in the mediaeval sense the old representation of *Land* was based on "inherent right"; it was not the organ, but the holder of the territorial rights and embodied the territorial unity; it was to the territory what the general assembly of fully qualified citizens, and not the council, was to the town. And secondly the legal unity which manifested itself in the territory was a special political and private law collective personality over against the territorial lord and the whole union of which he was the head. In contrast with this Gierke asserted that "an independent legal personality of the *Land* or people—independent within or without the state—in antithesis to the state government—is to modern thought impossible"; for "the state itself is for us the organisation of the collective people—rulers and ruled—for political and juristic unity."[2]

From the fourteenth century these territorial communities began conjointly with the territorial lordships to develop the idea of a "state" superior to them both. The

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 573–574.
[2] Ibid., pp. 575–576.

emergence of the state, Gierke pointed out, meant that the territorial community and the territorial lordship were no longer two individual unities, bound together by a complex of legal relationships, but were members of the state; that is, those two unities were active not merely for themselves but also for the state.

Gierke asserted that their agreements as to political relations were no longer mere treaties, but constituent and constitution-forming acts; their agreements as to peace, law and police were not legal transactions, but legislation.[1]

So long as the estates maintained generally an independent status not derived from the lord, the state remained a bi-partite unity. But in the following centuries the necessary consequence of the growth of the idea of the state was the decline of the estates, internally weak and externally powerless to maintain their position in the state, and the territorial lordship, alone strong enough to give full expression to the idea of the state, forced them more and more from the sphere of public law, as privileged corporations, into that of private law.[2]

§ 3

The time from the Reformation or the Peasants' Revolt of 1525 to the downfall of the old Empire in 1806 was the fourth period in the legal history of the German association, a period in which the idea of authority was the dominant principle and the association was gradually transformed into a privileged corporation. Towards the end of that time there began to emerge a new conception—that of the modern free association—to be the dominant principle of a fifth period.

Gierke held that "the privileged corporation" differed from the mediaeval association in its internal nature more than in name and form.

Its nature was in general such that it was a "corporation conditioned and determined by a privilege or a complex

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 577. [2] Ibid., p. 579.

of privileges vested in it." Formerly, even though an association sought and maintained privileges, these were only for the sake of the association and served its objects; the corporate union on the contrary was only "a means for the exploitation of the privilege" and existed only because of and for the privilege, i.e. "it appeared to be often nothing else than an incorporated privilege."[1]

The basis of existence of the union of the members could not be found in itself; its nature depended on privileges or concessions, and therefore upon a higher will. And not only its existence, but also its form—its organisation—was derived from outside; it became essentially an institution (*Anstalt*), for which the fact of its substructure being a union was not of essential importance.

Thus the formation and membership of corporations was brought down to a purely private law basis. Membership was obtained and treaties gained and lost merely from the standpoint of relative participation in the privilege.

The legal significance of the corporation declined correspondingly. Privilege was regarded only from the point of view of its use to the members, and more and more treated as a private right, even when its subject-matter was a public one, and so the corporation sank to the position of a private law institution.

Its members did not regard themselves as members of a great whole, but as private persons with a fixed participation in the incorporate privilege; and finally the corporation ceased entirely to be a "living organism" and became an arbitrarily constructed legal mechanism.[2]

Historically these great changes took place very slowly. The century which followed the Reformation showed a marked decline in the constructive power of the nation; there was a distinct reaction. The dominance of spiritual and religious interests, the growth of humanism, the growing demands of intellectual and social individualism turned attention away from public affairs. The decline of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 638. [2] Ibid., p. 639.

any general participation in self-government diminished amongst the mass of the people both political intelligence and the love of freedom, and the capacity for self-government.

In the seventeenth century the erection of the modern state depended upon the principle of authority embodied in the princes. But the political force of the people and the vitality of its corporate organisations were still such as to make it apparently possible that in Germany, as in England, there might be a compromise between the idea of the "authoritarian" state and that of corporate self-organisation and self-government, and that the German nation could, even in the strong unitary state, maintain the participation of the people in the formation and interpretation of the law, and in administration.[1] But the national disaster of the Thirty Years War destroyed this possibility. The German people sank so low that absolutism offered the only chance of recovery. From 1648 to 1750 there was practically no public spirit in Germany. There came a slow recovery with the renaissance of science and art and the great achievements of certain rulers, especially those of Prussia. But the old corporations could contribute nothing. The new movement must sweep them away, and rebuild.[2]

Gierke argued that the characteristic feature of the authoritarian idea of the state was that it set up the state as something different from the people, and concentrated in the abstract conception of the state, as a necessary unity, the sum of all the public power in a prescribed territorial personal sphere, with the right and duty to represent the common interest against private interest, to create order and law, and to regulate the relations of the members to the whole. In this conception the authority was "the representative of this abstract conception, and outside the state there were only individuals."[3]

Gierke considered the practical form taken in Germany by this idea of authority to be only an involution of the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 640.
[2] Ibid., p. 641. [3] Ibid , p. 642.

old idea of domination just as the commonwealth was derived from involution of the old association.

Different as the community and the authoritarian state might be, in both there was the unconscious idea of unity, embodied in the former in the collectivity and in the latter in the individual ruler. In the collectivity the collective law, in the authoritarian state the law of the ruler, was brought together in one single conception. The difference between public and private law became clear in both. In both the quality of the individual as a member of the whole became distinct from his quality as an individual; that is, for both the citizen and the subject there was a separation of public and personal duties. But the difference between the underlying legal ideas of community and authority was greater than the analogy. In the former all participated in the conduct of the affairs of the unity, whereas in the latter only an individual or sum of individuals represented it. In the former the unity was the highest "collective unity" which found its supreme expression in the common will and lived in the collectivity, whereas in the latter there was a unity distinct from the collectivity, self-sustained and acting through a superior individual will.

While the collective constitution determined the organisation by which the collectivity ruled itself, the authoritarian constitution involved an organisation which governed the collectivity. In the conception of "citizen" political right and duty, rule and obedience, and passive participation in the community were combined, whereas the subject was the holder of only private law rights and in public law had only duties—he stood in the state as the layman in the church. The community promoted the participation of the citizens in administration, judicature and legislation, and inclined to the principle of election, administration by boards and the majority vote; the authoritarian state kept the subjects out of public affairs, and favoured centralised administration by a unitary appointed agent.

Gierke pointed out that the absolutist state which the

authoritarian principle strove to bring into being appeared as the "police" state, for in so far as the conception of the common good is regarded as the highest conception, then the care for the common good, or "police," is that function of the state to which all other functions are subordinate.[1]

Thus the authoritarian state stood more and more definitely outside and above the law, in contrast with the "legal" state embodied in the community, which conceived of the law as a self-imposed check and sought as its final goal the unity of state and law. The authoritarian state wishes not only to have powers, but to have them exclusively; it is not merely the right and duty, but it is the monopoly of the authority to recognise, carry out and protect what is necessary for the common good.

The subject as such might care for his own affairs; he must rely upon the political authority in general affairs. Therefore the authoritarian state was a "guardian state" and it inclined at the same time to "a manifold bureaucracy, to centralisation and unification."

It resulted from these fundamental principles that authority tended to be entirely opposed to association. Like the community, it could not entirely avoid the formation of restricted unions and extra-state societies. But it pursued determinedly a double purpose. First, it sought to absorb into itself by means of the state conception all the public importance of the community and associations; and secondly it sought to reduce all the importance left to these unions to the level of a function assigned to them by the state. Thus all these corporations, in so far as they were of a public nature, should be parts of the state territory, or divisions of the subjects, or administrative districts or state establishments; so far as they did not come within these conceptions, they must be private unions which by means of a special state grant had the right to be treated within prescribed limits as unitary subjects of private law.[2]

Therefore the autonomy and self-government of the association ceased, and what *de facto* remained was founded

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 643. [2] Ibid., p. 644.

on either private law or a special grant. Even in regard to the right of property it purchased legal personality at the price of its independence.

This absorption of all communities and associations into the state conception on the one hand and into the individual conception on the other was only a symptom of a more general tendency, which sought to put absolutist individualism side by side with the absolutist state—the centralisation of government and the atomisation of the people.[1] This philosophy promoted either state absolutism or the emancipation of the individual and brought the great triumph of the social contract theories.

None of these theories recognised any intermediate members, having the importance of communities, between the state and the individual. Hobbes, like Rousseau, expressed himself strongly, though from quite a different standpoint, against any existence of independent separate associations in the state and therefore in particular against the right of free association of the citizens of the state. In Germany scarcely any legal philosophy up to Hegel, and least of all the Kantian, accepted any independent community or association in its system. Thus Gierke foresaw that the idealists would preach state absolutism ever more and more, until at last the communistic ideals would sacrifice not only the political but also the private right personality of all individuals for the benefit of the "one all-sufficient state."[2] When the theories of the philosophers were applied in the French Revolution and began to influence Germany directly, it appeared that the Revolution had not overcome the old duality of state and people, so that, whilst by the setting up of an absolute state and the full recognition of the individual it had brought about unity and equality in state and law, yet by the transformation of the state into a machine and the non-recognition of smaller organic unions it had destroyed the basis of any active national freedom.

Finally from the eighteenth century the influence of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 648–649.
[2] Ibid., p. 649.

the political economists worked in favour of the authoritarian form of the state. For as they argued—rightly or wrongly—that the existing economic conditions prevented the full development of the national well-being, they encouraged the governments to intervene to promote, check and modify private, association or community economics.[1]

Out of the idea of the absolute state, which resulted in the centralisation and mechanisation of the state organ and function and the atomisation of the people, the spirit of the new association emerged and led to the formation of a new association movement in Gierke's own time.[2]

The nature of the modern association movement evidently more closely resembled the union movement of the Middle Ages than the corporation privileges of the later period. In many points it was opposed to the latter whereas in comparison with the former it is only, as it were, a higher stage of the development of the same conception.[3] Like the union of the Middle Ages, the modern association was evolved from the inner consciousness of the nation and built upwards from the foundation; it was also the expression of the self-consciousness of an awakening nation and of the people's power, creating freely for itself the forms of self-determination and self-administration.

As the mediaeval union was hostile to the idea of domination and of service, so the association movement was opposed to the idea of authority above and outside the collectivity.

Therefore the new movement, like the old, was opposed, limited, forbidden, by the holders of the older principles, but they did not succeed in stifling the new idea; like the union, the modern association is based on freedom and seeks constantly to widen its sphere. So Gierke asserted that just as the union was active in a twofold manner, "transforming the necessary associations and newly creating the voluntary associations, without

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 650.
[2] Iibd., pp. 650–652. [3] Ibid., p. 652.

any rigid boundary being drawn between these two activities, so also the modern association is active in both these two directions, without any precisely defined limit."[1]

Gierke held that the fuller development of public and private life on the one hand and the greater precision of legal conceptions on the other produced a cleavage of association into various branches which in formation, organisation and legal importance differ more sharply from one another than did the association forms of the mediaeval period.

There is first the clear distinction between the unions with their own legal personality and mere societies. Among the former the state unions, whose existence is independent of free will, differ much more than in the earlier time from the voluntary unions. Gierke held that it is of the greatest importance that the public and private law has been separated and that consequently unions of public law significance are in accordance with the principles of private law. Consequently the danger of transformation into privileged corporations is averted.

But the greatest difference between the modern and the mediaeval associations is that, by continual dividing up of the union body, associations for special purposes have been more and more built up; and that contrary to the tendency of the mediaeval period to extend each association to cover the whole life of its members and to regard itself as a community, the opposite tendency has been manifested, namely to define precisely the purposes of every individual union, to shape its organisation accordingly and to limit its importance.

So Gierke asserted that even for the highest of all associations, the state, the modern tendency was to prescribe purpose and thereby to determine its nature. And he added that the purposes for which communes of the higher and lower grades are set up become still more closely defined and often special unions similar to associations are set up for single purposes, and that "the same applies to the Church and other public bodies."

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 653.

This assertion that the State is on the same level with the Church and other public bodies was a characteristic feature of the *Genossenschaftstheorie*, in which modern pluralism and the federal ideal find their basis.

Finally Gierke laid it down that in the voluntary unions limitation to certain special purposes was at the time he wrote "a general rule"; there were corporate associations which existed solely for the defence of property rights and others which existed exclusively for definite intellectual and moral purposes. These seemed to him the chief purposes for which people grouped themselves together. The precise formation and organisation of each individual association was bound up with the definition of its particular purpose; and with this was closely connected the precise limitation of the extent to which individuality was sacrificed to the association, that is, of "the relationship of unity and plurality."[1]

Gierke held that man, even in his relation to the state, seeks to express in a definite formula which of his individual rights shall be inalienable. But in the sphere of voluntary association there is the possibility of belonging to some association or other without giving up one's own personality.

If the individual as a citizen helps to form the state, a province, a commune and perhaps a special association for the maintenance of the poor or schools, or roads, or as a member of a religious body helps to form a church, or as a member of some profession helps to form a gild, or as a personally active member helps to form political, social, benevolent or friendly societies, or as a shareholder helps to create a business corporation, at home and abroad, he loses his individuality legally so little that there seems to be scarcely any limit to the creation of new associations for similar or other purposes.

"The modern association," Gierke said, "is therefore compatible with the greatest individual freedom," whereas the gild system led in the long run to the fettering of individuality.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 653–654.

Whereas the old gild system united the members as closely as possible in order to differentiate the association very sharply, the modern association compels its members to act together only as much as is necessary for a certain definite purpose, in order to create out of the many separate unions interacting one with another a great collective unity, in which there is no longer any separation according to classes or status.

The modern association does not exclude the rural population, although it originated in the towns, but draws the whole nation into its organisation.

Finally Gierke assumed that the modern association had overcome the danger of placing particularity above collectivity, and thus creating states within the state. For, as he explained, it was face to face with a strong state unity, already developed, and had moreover the inclination to avoid the centralisation of the state, without weakening that state conception, attained after thousands of years, whose value it recognised and in whose powerful manifestation it readily acknowledged the measure and limitation of its own sphere.[1]

Gierke thought that up to his own time the effect of the new idea of association had been shown particularly in two directions.

There was first the modification of the union whose existence was independent of the will of the associates. In so far as it strove to obtain for these an inner life conditioned and determined by the collective will and an organisation adapted thereto, with an association form, it brought about a series of far-reaching changes in public law, which breathed a new spirit into the old lifeless bodies.

Above all it had begun again to identify the state with the nation, because in the representative constitution, public control of administration, the participation of the people in the formation of the law and the restoration of the popular share in criminal trials it gave expression to the idea that "the state is nothing else than the organised

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 655.

people, and had put this state under a supreme authoritative head but based it on an association of citizens." But there was also an approximation to the partial reorganisation on the same lines of the more limited public unions, in that the first steps had been taken towards the autonomy, self-government, and organisation, as associations, of the communes, districts and provinces and other similar unions and other public law corporations. Even in the Church the idea of the institution had had to yield to some extent to the idea of the religious association.

Secondly, the association idea had been creative on its own account, in calling into life a great number of free associations of different kinds for all sorts of purposes. In a relatively short time the voluntary union had become a powerful authority in private as well as public law, in the unions both of capitalists and workers, in the political, religious, spiritual, ethical, social and economic spheres.[1]

The political side of the community associations was the starting-point of a new formation which in the first instance was imposed entirely from above and set up the territorial commune, in the sense of a state institution with juristic personality wholly or almost wholly without association elements, but which nevertheless in the latest period was the basis of the formation of a commune having both a state and an association character.

The old free commune (*Markgemeinde*) had from early times been imperilled by two movements—the tendency towards the change of the old communal property into the sole property of the lord, and the tendency towards the division of the common property into individual properties of the various members.[2]

The formation of a purely political community was inseparably involved with the downfall of the old communal association, which was as much economic as political, and the absorption or separation of its economic elements either into private unions or into mere private law relationships.

Thus the constitution by authority of the district

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 656. [2] Ibid., p. 675.

community meant a new phase of political communities in which the independent positive power was always derived from the authority which of its own accord and from outside formed the political communities out of such materials as were available.[1]

The national atomistic idea for which the unitary state and the emancipation of individuals were struggling brought a new creation of political organisms after the French Revolution. This new creation was not a "self-developed association organism" but an organised body created by the state.[2]

Through the revolutionary principle of "administrative absolutism" the community became "an arbitrarily constituted administrative mechanism," based on local divisions of the state territory and local bodies of citizens of as equal size as possible.

In the nineteenth century the rise of the "police" state system brought about a position in which the country communes were nothing but police districts and corporations under the control of private law.[3]

The association system in the towns was affected by the same forces. In the new state and legal system there was no room for a free municipal constitution. There were two courses open to the towns. One led to full independence and the other to complete dependence; but each led to the subordination of the association community to the authoritarian principle. Either the towns must be territories, subject to authority, in which only a corporation was possessor of the supreme authority of the *Land*, or they must be communes dependent on external authority and so decline politically to the position of state administrative institutions and in private law to that of privileged corporations. The beginnings of this change appeared in the fifteenth century; it was at first checked and then hastened by the Reformation; the Thirty Years War was disastrous; thereafter the idea of authority permeated gradually all the details of town administration;

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 693.
[2] Ibid., p. 695. [3] Ibid., p. 696.

and finally the revolutionary legislation completed the work by helping a few towns to obtain complete sovereignty and destroying all the other political communities.[1]

In the nineteenth century the comprehensive municipal enactment which was finally established by Prussian state legislation substituted in many respects law for liberty of municipal action; its conception of the municipality was however nothing more than that held by the absolutist administrative state, cleared of some overgrowth and excess. Gierke explained that the town was "according to the state law nothing but a state institution to which the state attributed the quality of a privileged corporation" for the better attainment of the state purpose. The town magistracy acted as an organ of the authority of the *Land*.[2]

As regards the basic idea of the nature of the local commune, almost all the newer legislation adopted the so-called "conciliatory" system, which sought to establish harmony between state unity and communal freedom.[3] This system was regarded by Gierke as the only one which was suitable to the time and appealed to the legal consciousness of the people as being Teutonic. But he held that up to 1868 neither in practice nor in theory was the system recognised as a real conciliation, and real harmony had not been attained. He thought that in reality the authoritarian system formed the basis of communal organisation and had been in a very unequal degree modified by the modern association idea. To Gierke the commune was still only "a state institution for the local fulfilment of state purposes, confined to a defined part of the state territory and comprising a definite number of the state citizens, and given corporate rights for the better fulfilment of the state purposes."[4]

It was only as a modification of this principle of a state institution with corporate rights that the new association elements became effective and preserved for the communes the possibility of becoming in the future communal

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 677.
[2] Ibid., pp. 707–708. [3] Ibid., p. 713. [4] Ibid., p. 714.

associations. A system which professed to be one of conciliation must start from "equality of origin of the state and the community, just as the individual is on an equality of origin with the state."

But whether we consider the state as "a higher mystical formation" or regard it as self-originating, the commune is deemed to be a state creation. If the state will is the basis of the existence of the commune, the latter is not a "self-creating organism with a self-derived personality," but a body created from outside, or rather a machine which appears to have life but is in fact moved from outside.[1] As the idea of conciliation involves the recognition of inherent rights in both parties, it could not exist in such a relation between the commune and the state. For convenience the state might hand over certain functions to such a commune and grant to it a certain independence; but one could not speak of the right of the commune, since its collective legal personality was entirely derived from the state.

All the enactments distinguished more or less between the commune as an institution of public law and as the holder of private rights, and gave it therefore two distinct legal characters.

In public law the commune was regarded, and acted, as a mere state institution, as the lowest part of the state body, and therefore its political purpose was identical with the state purpose, which it was bound to endeavour to realise within its local sphere.

If some laws ascribed to the commune two purposes, one of the state and the other particular to itself, the latter was understood as being only of private law importance.

Secondly, in private law all laws ascribed an independent personality to the commune, which should rank as a moral or juristic person, or as a corporation—that term meaning a union endowed with juristic personality. But Gierke pointed out that according to the theory adopted in most positive laws and frequently applied in general legislation relating to communes, such a personality was

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 714.

a "mere state-permitted fiction, and simply gave to the commune, without touching its state function, the legal status of a holder of property rights, and nothing more than this."[1]

But if the commune was not in public or private law a "collective active personality" but merely had the dual nature of a state institution and of a corporation, then the basis of its collective being was actually only the state will and its establishment, modification and cessation not only required state approval, but in the last resort were entirely dependent upon the state.

As a state institution the commune was the result of an administrative act; as a corporation it was based on a general or special state concession.[2]

All laws ascribed to the commune juristic personality, and therefore legal competence, in private law. As a corporation the commune had common corporation rights as to internal matters but was more restricted than ordinary corporations.[3]

Therefore the autonomy of the commune was not only limited, but was in principle denied, because the constitution of the commune was derived not from its own will and right, but from a part of the state law.

Thus the commune, determined in its smallest details *a priori* by external powers, was in its legal nature no longer "a living organism, added and adapted to the state whole"; it was "not even an organism"—but a piece of machinery made and installed from outside.[4]

As a political unity the commune was regarded as having a threefold relation, namely to higher, co-ordinate and narrower unions.

In its relations to a higher union and finally to the state itself the commune appeared as a "dependent member," having like individual citizens "independent political rights" and "independent political duties."[5] As its recognised public functions were more or less derived from a special state grant, it appeared as a "functionary of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 716. [2] Ibid., p. 717.
[3] Ibid., pp. 745–747. [4] Ibid., p. 749. [5] Ibid., p. 752.

the state." In the cases of the larger communal bodies, districts and provinces and in the state itself it was entrusted in very different degrees with special franchise and electoral rights and rights of nomination, and so helped to form the representative bodies of all those unions.

In relation to co-ordinate unions or outside individuals the commune had in general the same political rights and duties as an individual citizen. Only in respect of the right to unite with another commune, and sometimes in respect of the right of petition, was the commune in a worse position than individuals.

Finally, in relation to the more limited unions within itself, the commune used to be entrusted with supervision and tutelage in conjunction with the state, or the next higher supervising authority.

As a political and ethical collectivity of the separate individuals making up its membership the commune must have the importance of an independent body for the whole sphere to which the local union extended for the attainment of common human purposes.[1]

So Gierke asserted that by its very nature the commune must be recognised as an association community which was to those below it a generality, but viewed from above (*nach unten*) was a part of a higher generality and in relation to individuals was itself an individual.[2]

But just as it could not again be a mediaeval state within the state, so it could not remain a state institution with a derived juristic personality; but it had "an inherent organised personality, which the state created as little as it did the personality of the individual citizens, but to which it gave legal effect, set limits, and also made serviceable." Therefore the communal personality was "in private law no more and no less than an individual." In public law this community personality was at once a member of the higher organism, above all, of the state, and for its members a generality.

So Gierke concluded that the relation of the state to the commune was "a legal relationship," and therefore

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 753. [2] Ibid., p. 759.

like all other public law demanded the recognition hitherto refused and protection secured by legal process instead of by administrative discretion.

He assumed that the commune itself had its own organism; as a whole it might be an organ of the state, but the organs of the commune could not possibly discharge at the same time the functions of state organs. For the purposes of supervision the state needed its own special organs, but Gierke strongly condemned the Prussian practice which made the executive of the commune an organ at the same time of state administration within the commune.[1]

From the old unitary communal associations, which covered the whole field of human association, special corporations developed in order to continue the one or the other part of the communal activities as independent organisms.

These unions had like the communes a territorial basis and compulsory membership, but differed from them in that they were concerned not directly with a wide range of communal activities but with special purposes.[2] Gierke called them "commune-like unions for particular purposes."

The tendency of the authoritarian state to dissolve the old associations had been very favourable to the wide development of these special bodies. But whilst they had hitherto kept more or less the character of special associations, authority now tried to turn them into simple state administrative districts or into state institutions with juristic personality. Their number had greatly increased; some lost all their importance as corporations or started without it; in others the association idea took new life or had even co-operated with the state organisation in their formation.

The communal life of the superior and larger areas was destroyed much earlier and more completely than that of the smaller localities. But the communal idea was not lost; it only took other forms. In every district that

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 761. [2] Ibid., p. 765.

constituted a lordship there grew up an association—though it might be a dependent one, which under the influence of the mediaeval idea of union made the inhabitants into an independent association-commune, though all the superior communes were organised on the lines of estates. The idea of authority declared uncompromising war upon the participation of the association idea in the nature of the state. An authority, superior and external to the subjects, must be the sole source of all public law; the corporate communal bodies could at best continue with only private law importance. The autonomy of these bodies was swallowed up in the legislative power of the territorial lord; with the development of the new legal procedure the participation of the inhabitants in the administration of justice came to an end; and finally local self-government gave place entirely to administration by the lord's officers.[1]

Gierke pointed out that in the nineteenth century a powerful movement had brought the revived association idea into operation in these larger districts. But this movement made slow progress, and in 1868 Gierke could still write that the state-like character of the larger communes was not yet accepted; they were regarded only as administrative districts, which were incorporated by the state for definite purposes—that is, were state institutions with juristic personality. Starting from the dominant theory of the exclusive political personality of the state, it was held to be "incompatible with the state unity to recognise the members of the state as independent communities which had given up only a part of their personality to the state."[2]

The idea of association, especially in Prussia, however incomplete, prepared the way towards harmony between "centralisation" and the communal life of the districts and provinces. Accordingly Gierke asserted that the legal nature of the territorial unions formed above the local communes tended to be ultimately that of the association.[3]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 781–783.
[2] Ibid., p. 783.
[3] Ibid., p. 801.

The evolution of the authoritarian state idea in the territories of Germany involved the denial in principle of association elements in the state. Therefore the actual development of the new system of administration, legislation and judicature corresponded to the abolition of the share of the estate association in the life of the state. By the middle of the eighteenth century the idea of the system of estates had yielded to the idea of the authoritarian state. And in the eighteenth century it was shown to be impossible to reconcile the territorial estates principle of representation of inherent right with that of the principle of the "representative state." The attempt to re-establish the estates only served to strengthen the national belief in the necessity of a popular representation and so led to the final realisation of the "representative state."[1]

§ 4

Gierke then proceeded to examine the relation of the modern German idea of the state to the association idea, and his remarkable exposition brought an entirely new development of political ideas.

He asserted that the idea of the state was and would be for the future determined by the principle of popular representation, which is "the expression of the gradual transformation of general and equal state citizenship."

Discussing the difference between the modern popular representation and the estates corporation of the Middle Ages, Gierke pointed out that the individual member of parliament is not there of himself and for himself, but is there solely as a member of a body and for the whole collectivity. But the popular representation as a whole is also only a member of a higher collectivity and lacks independent collective personality. Only in regard to the arrangement and conduct of its own business has it autonomy, self-jurisdiction and self-administration; and these powers are not of a corporate but merely of a

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 822.

collegial character, and rest not on any internal corporate constitution but on the state constitution which convokes an assembly as a unitary state organ.[1]

Since the representative assembly is itself not an association or independent organism, it is also not an organ of a particular territorial commune or of a special organism of the people in the state.

In relation to the state or to the prince it is not a juristic subject; it is also not the representative of a particular juristic subject. It is exclusively a "state organ established for strictly determined functions."[2]

The unity of the state came into existence with the disappearance of the special territorial or estates association. The old dualism (*Zweiheit*) of the state was not brought back by the formation of the representative constitution.

Gierke assumed that there could conceptionally be only one indivisible unitary state personality, which is not composed of "the separate personalities of the territorial lord and the territorial commune," but manifests itself in both as an organ.[3]

This unity was not yet fully recognised by the legal consciousness of the people or even accepted by scientific thought. There was frequently the idea that prince and people were different legal personalities (*Subjekte*). Such a conception, corresponding equally to earlier German conditions and to the idea of the state held by most Romance nations, was, Gierke thought, incompatible with the German state theory of his own time.[4]

He asserted that, if the idea of the constitutional state is in fact carried into effect it has not, any more than the people, a personality apart from the state; the prince is simply an "organ, an embodiment of the state personality." He has at the same time an independent, private law personality, but this is not the basis of his position as head of the state. He is no more a prince of his own inherent right but only a prince by the law of the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 825.
[2] Ibid., p. 826. [3] Ibid., p. 827. [4] Ibid., p. 827.

state. To put it shortly, "not subjective, but objective, right is the basis of his authority."[1]

The constitution alone determines the sphere of his competence and obligations, in so far as he is a prince; that is, in so far as he wills and acts within the ambit of the constitutional function, he wills and acts neither as an individual personality nor for the state, but the state wills and acts "in him and through him."

If a single indivisible state personality presents itself, the number of the state organs is not limited to the prince and the representatives of the people; the collectivity of state citizens and the courts are also in that category. The whole body of citizens is restricted to one function, the election of the representative organs; the courts however, whether appointed or elected, are called to their chief task, the interpretation of the law, not by the special demand of another organ of the state, but directly by the legal organism of the state. The requirement that they shall be independent, irremovable, and not answerable to any other body in the constitutional state, and the introduction of the jury system, rest on this basis.

The state personality is directly manifested in four organs—in the prince as the sole organ representing the state externally and administering internal affairs; in the representation of the people as the organ representing the plurality against the individual; in both combined as the common organ, setting up and interpreting the law; and in the primary assemblies as elective organs. All the other state officials and functionaries are only indirect state organs, because they are organs of the state organ and represent the state only indirectly.[2]

Gierke emphasised the fact that the existence of "the constitutional ministry" is "an essential" of this conception, because the highest organ of the constitutional state must be a "non-responsible prince supplemented by a responsible ministry."

Gierke next laid down the doctrine that the nature of the modern German state idea depends on "the identity

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 828. [2] Ibid., p. 829.

of state and people," saying that "the state is the organised people." The people, which as an historically developed unity appears to be divided spiritually, morally, economically and even physically, attains collective personality as a state.[1]

He asserted that the requirement of unity of state and people carries with it the requirement of the unity of state and law.

In contrast to the ancient and Roman states and the "police" state as it existed for a time in Germany, the modern German state was "a state based on law (*Rechtsstaat*)."[2] It was not a reversion to the old German position in which the state was absorbed by the law, but it existed only for the sake of the law and was under the law. But equally the state could not be superior to the law or absorb the law, but rather must it be within the law; its very nature is law, that is, public law must be regarded and protected as actual law.

The constitutional state can act in the sphere of its positive life only within the constitution, and conversely the law can act only in individual relations. So far as the state touches any other part of the life of an individual or one of its members, it is bound by the law; conversely the public law, that is the law which regulates the relations between the state as the collectivity and the narrower collectivities and individual citizens as members of that higher collectivity, and therefore maintains the state organism, is bound by the state. As therefore in public law freedom gives way to necessity, so the state must on the other hand recognise the law as the insuperable limitation of its own activity.

Thus the rule, *Salus publica suprema lex esto*, is inverted in the "legal" state.[3] Gierke asserted that the "public welfare" is indeed the "subject-matter of the state's activity," but the law indicates the "limitations of the extent to which the pursuit of the public welfare should be allowed to conflict with the welfare of the individual."

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 830. [2] Ibid., p. 831.
[3] Ibid.,p.831. Gierke. *Der germanische Staatsgedanke*. Berlin,1919, pp.17–18.

If the law be inadequate to the state need, it must be amended by the law-making organ proceeding in accordance with the constitution. If the law is doubtful or disputed, it must be declared by the judicial organ, the courts. There must be an interpreting power above the public law, and Gierke pointed out that the idea of the legal state culminates in that need for the judicial protection of public rights which the positive laws still denied almost everywhere in Germany.

Then Gierke entered upon the discussion of the relation to the association theory of the modern state idea, the purpose of which is to substitute the unity of state and people for the authoritarian state and the juristic state for the administrative state. The association idea, he held, does not claim to determine the modern state idea or to be identical with it, but does claim to be part of it.

He remarked that when Bähr regarded the state only as "the highest and most comprehensive association" in his essay on the *Rechtsstaat* in 1864, that idea was based mainly on a more comprehensive use of the term, to cover every form of human union. Gierke however agreed that Bähr's principle was sound in so far as the state can be conceived of in the form of a union; but held it to be unsound in so far as it related to the historical manifestation of the state, because "the state was and is to many peoples far more an institution (*Anstalt*) than a union."

The German state, during the period when public rights were non-existent, was not in any way a union of citizens; it was an institution standing over and outside the association, i.e. a personality transcending the people. But as the modern tendency, in harmony with the fundamental German idea which it rejuvenated, strove to re-identify the state in theory and practice with the civic association, and to set up a state personality immanent in the people, then indeed in this sense, as Bähr showed, the modern German state was nothing but the highest and most comprehensive human association.

Stripped of its mystical character and brought back to

a natural growth instead of to a supernatural origin, such a state was not generically different from the narrower public law unions comprised within it, or from communes and corporations, but was only a more advanced phase of development.[1] It and the communes and associations are in fact homogeneous. Admittedly there are far-reaching consequences of the one difference between them, namely that the state as the highest collectivity has no collectivity superior to it, that is it is "sovereign," whereas all the other unions are determined by something outside themselves and are in the last resort externally regulated. But the view which draws from this fact the conclusion that the state has an absolute and exclusive political personality and allows to the smaller collectivities at most a fragment of political personality derived from that state personality was in Gierke's judgment incompatible with the modern state idea.[2]

But if in fact the state, according to the ideas of his time, appeared as the highest and the most general association, it did not follow that it was "a mere association or nothing but an association."

If the conception of association could be made so wide as to cover such a union as is essentially necessary and is voluntary only in form, or a union for which territory as well as a plurality of persons is requisite, then, Gierke held, the organisation of the state, as it has developed in history, was of the nature of an association only to the extent of one half. For whilst the idea of an association union of the collectivity of people, i.e. of an association of citizens of the state in which the whole body of free citizens were active members, formed the basis of the modern constitutional state, its headship was derived from that lordship which had been converted into a princely authority.

But the essential feature of the constitutional organisation of the state is that it aims at the fusion of the association and domination elements into a harmonious unity. The modern state idea therefore contains the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 832. [2] Ibid., p. 833.

reconciliation of the primitive association idea and the primitive domination idea.

Therefore Gierke laid it down that the representative constitutional state itself is neither a mere association, like the old patriarchal state, nor a mere domination, like the feudal state, nor a mere association community, like the mediaeval town, nor a dual state consolidated out of an independent domination and an independent association, like the mediaeval territorial state, nor a mere authoritarian state like the state of the new era, but "a community uniting the association basis (the association of citizens) and the dominant head (the monarchy), and doing this organically, that is, producing not a mechanical aggregate, but a new living unity."[1]

The change which the association principle underwent in all relationships manifested itself from the end of the Middle Ages in both the association of the "Empire" and in all its members. Had the Empire been transformed, by the power of unity, from a dominant union made up of dominant unions into a unity made up of unities, it would never have sunk to being a close corporation whose members themselves sank into being close privileged corporations.

With the establishment of permanent peace throughout the territory and the mediatisation of the nation the system of free unions gradually lost its importance for the Empire. Some of the great federal unions which survived the Middle Ages continued for some time, like the Swabian Union until 1533 and the Hanse until the Thirty Years War, but their internal vitality and external power steadily declined. Then the number of independent members of the Empire was definitely fixed and as the result of their extended right of political union the corresponding right of the mediate states was destroyed.

The Peace of Westphalia established expressly and simultaneously the state character of the territorial power and the international character of all leagues (*foedera*) and unions (*uniones*). In Gierke's judgment this meant that

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 833.

by the identification of the conceptions of international federation and political union the right of union inherent in the old complete German freedom was converted into a "privilege of the imperial estates."

In the same way the old German autonomy and the right of trial by one's equals turned from being attributes of freedom into privileges of the imperial estates.

The right of political union was a privilege of the imperial estates, and this affected the whole character of the unions which already existed or were formed under them. The existing unions became close bodies and privileged corporations which did not aim at the restoration of a unity over the members, but at the collective maintenance of individual privileges. The unions formed themselves either on these models, or more commonly set up merely temporary contractual or partnership relations.[1] Whilst in Switzerland the idea of the federated state (confederation) survived the fiercest disputes and internal conflicts and very slowly and with many interruptions at last created a strong federal state, and whilst in the Netherlands the same idea of a powerful federal community developed, in Germany all federations continued to lose their state character.

Then after the Reformation and during the Thirty Years War the political league system entirely changed its character. From being a constituent, state-building power it was transformed into a "system of treaty-alliances and of incorporated separate interests."

The old union system aimed at the foundation and recognition of the collectivity over the particularity and consequently of the association community, whereas the new system of federation aimed more and more at the increased effectiveness of the particularity, and either did not go beyond the "international treaty relationships of alliances or leagues, or allowed of union as at most the servant of particularist interests, as a *corpus* in the new sense."

Therefore Gierke asserted that "nothing was further

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 835.

from the thoughts of the individual Estates of the Empire, seeking to become territorial sovereigns, than to sacrifice to a federation or union any part of their political individuality for the sake of a higher collective personality."[1] Mere treaty relationships in which the individual retained full and complete personality, and nothing was given up for the collectivity, were then the characteristics of many political and religious unions (*foedera*, *uniones*, *ligae*) of the imperial estates before and after the Treaty of Westphalia.

On the other hand the continuing unions of estates (of electors, princes, counts) and of towns had the character of corporations, as had also the unions of the lower orders of nobles. Membership of these resulted from the right to ownership of an independent manor, or from personal membership of a noble family which had been directly subject to the Empire, but new manors and families could be admitted. The constitution was "the product of free autonomous agreement."[2]

From the territorial standpoint also the Empire was made up of corporations, for every imperial district was organised as a particular corporation formed by the district estates and as the holder of inherent rights of the district estates analogous to those of the imperial estate. Originally these corporations were under a headman with a council; gradually a particular prince obtained a protectorate over each, or the right to summon and conduct the district assemblies.

The sphere of action of the district corporation was *de jure* very important, in that it was supposed to be charged with the maintenance of the imperial peace, the enforcement of imperial decrees, the imposition and assessment of imperial war services and imperial taxes within the district, maintenance of the imperial police, the supervision of coinage and customs, advice and decision in district affairs and preliminary consideration of important matters which were to come before the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 835–836.
[2] Ibid., p. 836.

imperial assembly; and had also district property, a treasury and budget.[1] But only a few districts developed a corporate life of so large a kind.

And just as the members of the Empire were not united among themselves as associations, but at most in a corporate manner, so the Empire as a collectivity developed more and more into a mere corporation. The only active members of the imperial corporation were the imperial estates; but they were so not on the "basis of a personal and equal association union, but on the basis of a sum of independently subjective material imperial estates, bound up with the territory and determined by it."[2] Just as the territorial estateship was treated as an appurtenance of the ownership of land with seigneurial rights, so the imperial estateship was treated as a matter of private law and as an appurtenance of territorial ownership with similar rights.

The development of the *corpus* of imperial estates was similar to that of the territorial one, but Gierke pointed out that there was this fateful difference between them, that while the territorial estates *corpus* ceased to play any part in the conception of the territorial state, the imperial estates *corpus* was and remained identical with the Empire. Thus the whole imperial constitution became more and more a mere corporation constitution of the estates, and the imperial assembly and its officials became corporation organs. Therefore from the legal point of view the Empire ceased to have any state element.

De jure as well as *de facto* the relationship between the corporation and state elements in the old Empire was the main difference between the old and the new German Empire.

The Empire possessed in the main only the power of making and applying law, whilst administration (the sphere in which the modern state has most asserted itself) was left entirely in the hands of the individual estates.[3]

Imperial "police" powers took the form only of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 838.
[2] Ibid., p. 839.
[3] Ibid., p. 840.

"imperial police legislation," and the supervision over the positive activity of the territorial state was merely based on the judicial rulings of the Empire. The organisation of the Empire for war was merely an organisation for the supply of territorial "contingents"; the imperial taxation system was merely one of contributions from the territories; the Empire had power to make decrees binding its members but had no independent administration or executive.

Therefore Gierke asserted that the Empire had only determining legislative and judicial organs, and there was no real imperial executive. As this public authority was vested in the Emperor only in a small measure and was vested chiefly in the assembly of estates, and these regarded themselves more and more as the organ of the particular interests and established rights of their members, the Empire could not continue permanently as a corporation of states, and drifted steadily towards dissolution.

Gierke then pointed out that in the nineteenth century attempts to set up a new imperial unity in the place of the fallen imperial association had been made in two ways without success.

All attempts at a voluntary union of princes had been futile. The princes desired only a unity which would serve those individual interests which they had in common; they did not want a real state unity above themselves, to which part of their own power must be given up. Thus an international union could emerge, with some apparent state elements, which through its members could do something but would not be a real federal state, which is strong despite its members and even against them.

If the German Union had a personality different from the sum of the union members, it would be an artificial "juristic personality," dependent on the wills of the individual members and set in action thereby. It was not a collective personality, self-constituted and combining the state personalities of the members into an independent organism and a living unity, and it was least of all a

personification of the German people, who remained entirely "mediatised" (i.e. without direct rights) in this union of sovereign princes and free towns, as in the old Empire, and even still more unconditionally than there.

But the attempts of the nation to constitute a new imperial community by itself had equally failed. Gierke perceived that, however powerful a voluntary association may be and however strong the revived sense of community, the movement from below towards union must fail in the task of setting up a collectivity with full state powers above the chaos of larger and smaller areas, unless it has the co-operation of the coercive force of some unity already constituted from above.

In his own time the curtain had risen on the great spectacle of the political rebirth of the German people.

He said "the foundation of the structure which should and will become the German Empire, and therewith a single and free German popular state as the first state of the world, has been laid."[1]

Two forces had combined to bring about this development. The first of these was the powerful initiative of the most centralised, the strongest and most comprehensive state unity in German territory. The second, without which there would never have been even the idea of the national state, was the newly awakened power of the people rising from below, and pressing forward on the path of associated union, from the crudest particularism to the highest collectivity.[2]

Thus two ideas which for many centuries of German history had been in fierce conflict, with constant changes of fortune, worked finally together towards the same end and at last brought the beginnings of a state in which there was room for their harmonious co-operation.

Gierke hoped that the constitutionally organised German collective state would finally overcome the primitive conflict between unity and freedom which had divided German life into domination and association, the

[1] He was writing before the formation of the German Empire of 1871.

[2] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 842.

conflict between the unity which created and developed plurality and the plurality which created and developed unity, and the conflict between order and election.

Extensively the unity would widen into a full national unity; intensively it must consolidate its members into a complete state unity.

Gierke asserted that though the legal nature of the existing German state structure was difficult to define, as it was a blend of confederate, federal and unitary state elements, yet the tendency of further development could be "neither to confederation nor to a federal state," but entirely to a unitary Empire.

Then he assumed that "a real state association is difficult to imagine among monarchical states, and quite impossible among states of which one is greater than the sum of all the others." A real unitary state was, he held, possible only if a centralised head and an association basis formed of the collectivity of the citizens united themselves into a single state collective organism. The individual states retained in such an Empire only the importance of territorial communities standing between the commune and the state. Even if greater autonomy, self-jurisdiction and self-administration, and an independent monarchical organisation with its attendant features, distinguished them from the provincial and district communes, yet these differences could not alter in principle their position in regard to the Empire.

He perceived that they must cease to be states within the state if a true unitary German state was to be realised. But admittedly they had to surrender only the nature of *full* sovereign states, and not their whole state nature. Not only should they become unions, homogeneous with the state, self-maintaining and restricted only in the interest of the central unity, but also the provinces and districts down to the local communes should become such unions, in the form of association communities. If the realisation of the independent state involved an unequal limitation of the individual states, on the other hand the unequal independence of the smaller and larger communes

was indispensable for the realisation of the free state. In this respect the association idea, which is the reconciliation of unity and freedom, has its role; the living organisms, possessed of their own independent political and individual personalities, which stand between the state and the individual, are alone able to establish the collective German state, at once unitary and free, on a secure foundation, by their inclusion in the imperial organism made up of the central imperial authority and the association of citizens of the Empire.[1]

It is possible to conceive of an association of states for particular purposes being superior to a collective state, whether that association be a confederation, a federal state or a unitary Empire with independent communal members. An example of this was the German *Zollverein*, the form of which appeared to Gierke at the time (1868) to be one of transition to a true state union of the whole German people.

On the other hand there had been hitherto unions of independent states for general purposes only, which had the importance simply of international treaty relationships, but there had not been any unions of states or people which had risen to "independent collective personality over their members."

The loosely organised unions of a number of states, such for instance as the railway, post or telegraph unions, were not to be regarded as corporations but only as treaty relationships. For international law did not recognise in any way the legal possibility of an independent collectivity above sovereign states, and to it the states in every relation were legally independent individuals and in no respect were they members of a higher collectivity.

The whole body of international law had only the character of private law, and there was a complete absence of any concepts, contrivances and guarantees which presupposed the existence of public law.

Nevertheless Gierke prophesied that although the tendency of the association movement in 1868 was not

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 843.

fully recognised, it would certainly lead in the near or distant future to unions of states and peoples as associations and finally arrive at an organised collectivity over and above the individual peoples.

Gierke next proceeded to notice the development of the new association idea in the German Church on the same lines as in the political unions, with the change in the organisation of the church from the *Obrigkeitsstaat* into the new form of spiritual association.[1]

The modern free unions had developed in every branch of human activity. The most important class consisted of the political unions, that is unions whose aim is directly to influence public affairs.[2] For religious objects, apart from the religious orders and priestly associations forming an organic part of the church, the modern spirit of association brought into being, especially between 1814 and 1848, very many voluntary unions. Again, many societies were formed for the promotion and application of science, and the encouragement of art, and various kinds of associations developed for commerce, labour, industry and communications. Again, there were associations for physical culture (rifle clubs, gymnastic clubs, cadet corps); literary and linguistic associations; societies for the protection of persons and property (of decreasing importance as the state has taken over more and more of this function); the very important professional associations and societies for the defence of particular interests; associations for moral and ethical purposes; philanthropic associations; social unions; societies for dealing with special women's questions; and especially trade unions, which began to be active in German life after 1848.[3]

The variety of the purposes of these voluntary unions led to extraordinary variety in their modes of formation and organisation. It is this very flexibility which allows to the modern association, by its suitability for the most comprehensive as for the most limited purposes, a higher and freer development than did the mediaeval union system,

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 844, 847, 858–859, 861, 864–865. [2] Ibid., pp. 893–895. [3] Ibid., pp. 896–901.

which had little diversity of form because it was dominated by the forms of the federations and gilds.

The organisation of the associations so formed is, as Gierke pointed out, as diversified as their purposes and modes of formation.

Finally in this connection Gierke remarked that the increasing importance of the voluntary unions in the political, spiritual and social spheres in his own time corresponded to an increased use of this form of organisation by the state itself. Apart from the compulsory state organisation and compulsory creation of associations, there was a marked inclination towards the "collegiate" or "board" form of administrative authorities, and secondly there was a disposition to regard persons who had the same kind of office or profession or interest as forming natural associations and to give them in that capacity their own organs (e.g. commercial or trade councils).

Gierke next proceeded to a very comprehensive survey of the voluntary economic associations, ranging from monopolies to joint-stock companies, and from trade unions to productive associations. He ended this survey with the conclusion that in Germany the capitalist principle lay at the foundation of the whole law of association, and the personal association with a corporate constitution was regarded and treated as a mere modification of the capitalist union.[1] And he recognised that the highly organised economic association, such as a production association or a personal association for economic purposes, was a kind of "corporation," being "the product of the autonomy of citizens" as a completely free association.[2]

He admitted that the legal importance of such an association was that of a free artificial corporation and it was "externally as well as internally a collective personality."[3] *Vis-à-vis* the state it was a free economic organism, self-constituted and not subjected to any special police supervision.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 1100.
[2] Ibid., p. 1106. [3] Ibid., p. 1110.

§ 5

The first volume of Gierke's *Deutsche Genossenschaft* was thus a graphic presentation of the history of human association. In the second volume of his great work, published in 1873, he undertook to examine more closely the history of the idea of the corporation (*Körperschaft*) in the light of the principles derived from the history of the German association. This theory was based on the legal idea of the philosophical basic principle of "personality," either individual or association on the one hand, and of the historical basic principle on the other.[1]

He began by rejecting Savigny's doctrine of personality, which was that originally the conception of the "legal subject" was identical with that of the individual human being; each individual, and only each individual, had legal capacity. Positive law alone could limit this conception by denying to many individuals all or part of this legal capacity, or could extend the conception by transferring this capacity to something outside the individuals, that is, to a "juristic person." Philosophically Gierke regarded this as partially sound; but it seemed to him wholly useless as the starting-point of an historical investigation.

He also refused to accept the Roman conception of personality which was bound up with the idea of capacity in private law and was derived from the "idea of the individual (*singulus*)"; the personality in Roman law was "absolute, indivisible and non-transferable."

He upheld the doctrine of "collective personality," namely that the starting-point of personality was not "the co-ordinate relation of the absolute will of the state and of a sum of sovereign individual wills, but the unitary conception of a moral free will."[2]

On this assumption, however incomplete the German legal idea may have been in so far as the association was formed by the corporation conception and domination by

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, Berlin, 1873, p. 25.
[2] Ibid., p. 30.

that of authority, the old association, Gierke firmly insisted, had a collective personality because it granted the "capacity of collectivity of will and action" to the mediaeval Church and Empire as legal subjects.

Such idea as the German people had of a higher state power was embodied in the idea of the Empire, possessed of ample resources. And so Gierke examined the "Empire" as a legal "subject." He pointed out that in the Middle Ages in particular the belief prevailed that the "Empire" had from the first been by reason of its divine institution the supreme earthly authority, but that the continuity of the imperial power depended not on an "identity of its subject," but on the stability of its objective conditions. And the subject of the highest and most comprehensive imperial authority resulted from the fusion of the Emperor and the collectivity of people.

As there was no distinction made between the individual property of the Emperor and the state property, so until the later Middle Ages the "subject" of the supreme public power and property was not a theoretical and conceptional entity but a visible concrete possessor of them. Not the Emperor alone, but the Emperor jointly with the collectivity of the imperial estates was the "subject" of the imperial power and property. From the thirteenth century onwards the conception of an "ideal" collective personality of the Empire began to be manifest, but it became complete only when the Empire had lost most of its importance and had become a federation of estates. This imperial personality was not a "real state personality" but a "union personality."

The German conception of corporation was comprehended in the town personality.[1]

The town was the natural and political unity, which had its being in the organised body of citizens attached to a single area as an "organism," and was legally recognised as having a legal existence as a "person." Admitting the town to be a collective person, Gierke held that the town personality was in its relation to the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 820.

collectivity which formed it a real "independent, immanent unity."[1] The town was to him, as a community commonwealth, a unitary being immanent in, but not transcendent to, the citizen community.

In the public law the town was consequently neither a state of the ancient type nor like a church institution, but a community having a state nature; that is, "a legal state." Therefore the town was not a juristic person as to which its embodiment in a community was a matter of inference; it was a collective personality whose legal nature consisted in the fact that as a community it was at the same time capable of holding property.[2]

The conception of the corporation, once brought to German legal consciousness in the form of the town community, permeated and shaped all the other associations of German law. "Collective personality" was the common characteristic of all corporations in German law, that is, "the unity immanent in a collectivity was recognised and considered as person."

The formation of the corporation was sometimes the outcome of a natural or historical necessity, sometimes the result of a constituent act of will. The town and other territorial unions were "necessary" communities; but many corporations, as for example the gilds, were voluntary in origin. The town, as a state community, served all the purposes of human association, and some other corporate unions had comprehensive purposes, but others were formed for limited purposes.

The town corporation was primarily a person of public law and only secondarily a person of private law. This was true of most other corporations also, but there was a beginning of corporations for private law purposes. There was a further distinction in the relations of unity to plurality, namely that the principle of corporative unity could be applied in all or in only some respects. In the town the corporation law prevailed in all matters essential to the conception of the municipality; other groups of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, pp. 820, 821, 825.
[2] Ibid., p. 828.

corporations presupposed a legal community which combined into a whole a body of special rights for its members and the right of collective personality. These differences, and many others which could be enumerated, made it in Gierke's opinion impossible to draw up an entirely satisfactory classification of corporations. He thought it would therefore be most useful to examine the conceptions of the state, the commune and the association, and the development of these three conceptions, on a purely Germanic basis, and in so doing notice in detail the further differences between them. It would then be necessary to determine the relation of the whole conception of corporation to the conception of a mere legal community on the one side and to that of an institution on the other.[1]

He defined the state as the highest generality (collectivity) become a person. It differentiates itself from all other union persons in that there is nothing similar to it and above it. But the state is also only the last of a series of unions developed into legal persons in that, like them, it embodies in a legal unity the common will towards the individuals whom it combines.

Thus the conception of the state is not contradictory to that of corporation, but is at once wider and narrower. It is wider because the state is the realisation not only of the highest stage of the corporation conception, but also of the highest stage of the institutional conception, that is, it can combine corporative and institutional elements. And it is narrower because the corporation conception must take on itself a series of additional characteristics in order to become the state conception.

The state can be "a corporation" and yet lack all corporative character. But the corporation inevitably becomes a state as soon as it is set up as the highest and most comprehensive union, in a prescribed territory, for the attainment of the purposes of human association. The corporative state can be described as "the state commonwealth" and the institutional state as "the authoritarian

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 830.

state," but a combination of the corporative and institutional elements, in many different ways, can also be a manifestation of the state idea.[1]

The development of the corporative conception was towards the state conception as its final stage.

The town was a collective state being which lived in the body of citizens organised as an association and developed on a particular territory. In so far as the town became a member of a higher union it must lose something of its state character, and finally surrender it entirely.

Analogous to the towns were the territorial communities which in isolated cases constituted themselves on a purely corporate basis. The state conception appeared here in "the form of a territorial personality formed of the land and the people," which was a copy of the town personality with the necessary modifications.[2]

Gierke's investigation of the development of political union in relation to the corporation conception was of unique value in relation to the federal idea.

He held that more important than anything else in shaping the idea of the state was the system of political union which, on the basis of the division into estates, had shaped the public life of Germany for three centuries. Because the plenitude of unions of estates, by themselves and with one another, resulted in the creation of political unities which in relation to their members were independent in many or some respects, it brought out the possibility of forming those state unions into a new federal union with only a partial surrender of their state nature.[3]

But the political unions did not by any means develop equally into corporative units, and unity was not equally complete in them. If their corporative nature remained it did not follow that they were necessarily of a federal unitary character; they might have such a character only in international or private law.

The great elasticity of the German idea of corporation,

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 831.
[2] Ibid., p. 832. [3] Ibid., p. 835.

in its application to political unions, showed itself in these varied creations. In the first place some only of the political unions developed into corporations, whilst others remained at the stage of a subjective legal relationship between a number of individuals. And whilst in the towns a long-existing unity was recognised and given substance, in these other cases the unity developed only gradually and almost unnoticed out of the original treaty and communal relationships. But corporate unions and mere societies or associations were externally much alike and there were many intermediate forms, and at any given moment it might be impossible in particular cases to decide if a collective personality existed.

In the course of time the idea became clearer and stronger that "gilds, like towns, were only the members and organs of a unitary legal entity comprehending all of them and superior to them." The individual corporations gained rights and liberties abroad, not for themselves but for an ideal, and at first hardly existent, union of all German traders or towns. With increasing frequency and definiteness the traders collectively and later the towns jointly or as a collectivity of towns obtained legal and treaty-making rights and the right to engage in legal proceedings.

Many of the unions for the public peace (*Landesfriedenseinungen*) unquestionably contained nothing beyond the establishment of a particular legal relationship. But as the sphere of public peace was widened, the temporary peace union was frequently renewed, and a number of permanent and regular institutions were developed.

Although the federal personality undoubtedly long enjoyed recognition and was active at home and abroad, the external and formal basis of the confederated commonwealth was not a "constitution" but "a system of federal treaties."[1]

The application of the legal unity was restricted at first to those relations which were primarily affected by the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 838.

combination in a union of such a kind and especially in the particular union. But even in the sphere of common authority and law thus limited the principle of unity did not obtain complete control. It was possible to combine in many ways the collective unity right and collective plurality right.

The collective sphere of authority could be divided into two parts, one of which was vested as a unit in the whole collectivity as an independent person, and the other was distributed as separate rights among the members of the community as a sum of individuals, whilst both together formed the conception of the whole union as an organic combination.

Gierke asserted that a "corporation was formed by a constituent act or under a principle of customary law, but in every case under some rule of objective law, whereas the basis of a mere legal community on the contrary was a treaty or a chance legal relationship, that is in every case subjective law."[1] All unions in so far as they had corporative nature undoubtedly rested on autonomous acts or on customary law. And also the basic acts in the form of treaties were or became statutes or rules which created an objective rule over the individual parties.[2]

Accordingly membership of a corporation involved the partial surrender of the individual will in favour of a higher collective will, whereas the legal community only united the individual wills of a number of persons for defined purposes. Thus the unity and identity of the collective body was independent of the changed individualities of its members. Therefore the federal assembly was the main organ of the collective personality for the corporative matters, whilst for other common purposes the whole body of members possessing rights, or a body of plenipotentiaries, might be the chief organ.

As to the quality of the corporative assemblies, Gierke laid it down that they were organs of a unitary common will which in the event of a disagreement between the individual wills was determined by application of the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 839. [2] Ibid., p. 840.

principle of majority vote or in some other constitutional manner. In the community, on the contrary, there was only a number of individual wills, which, in so far as they had not bound themselves in advance in regard to specific matters, were united only by free agreement for any collective action.[1]

Gierke next pointed out that in the larger organisations the constitutional functions of corporative organs and special powers for the representation of individual rights of members were often combined.

Thus the union was by its constitution, membership and organisation able "to be, to will and to act as a unitary person." And at the same time it was able to act in other relations as a plurality united by merely subjective community relationships. Thus such a union appeared externally and internally as partly a collective person and partly as a sum of persons.

Externally every developed union was recognised as a person in international law; as such it could make war and peace and conduct negotiations, and make treaties and alliances, and in relations with foreign powers act as an associated plurality either collectively or through collective plenipotentiaries. Internally the corporative unity was the source of positive law manifested in statute or custom.[2]

Each union community (*Gemeinwesen*) possessed legislative authority within the sphere of its unitary personality, and frequently federal action took the form of federal or association laws, statutes, ordinances, etc.—that is, the creation of positive law. But this law-making power was constitutionally limited by the independence and special rights of the members.

Secondly, every developed union had a judicial authority over its members. An independent federal court of justice, as the main organ of the whole, was commonly set up, and as "guardian" had not only to decide conflicts between members but also to impose penalties.[3] Gierke

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 842.
[2] Ibid., pp. 844–845. [3] Ibid., p. 846.

asserted that this tribunal was the organ of a collective jurisdiction which, once constituted, was independent of the individual wills in the sphere of the highest will.

Thirdly, the union corporations had an independent governmental authority, in that they could decide upon positive measures for the public and unitary purposes of the union and carry out those measures by their own organs.[1]

Finally, every union association was capable of holding property; but in this respect it could combine the unitary right of the juristic person and the communal property right of its members.

But even if the personality of a union were more or less complete, yet in respect of the formation of that personality there might be other differences, mainly resulting from the varying relations between unitary and plurality right, namely as to the extent to which the unity of the union was a creation of free will or was a higher necessity; whether the collective personality of a union was determined essentially by the united collectivity of persons, or if a definite territory was equally necessary to, and part of, the basic conception; whether the federal personality, as in the case of a voluntary and purely personal federation, remained only a union of will operating externally for the community and the separate powers comprised within it, or if it penetrated in any respect into the internal life of its members, and thereby had direct contact with the individual citizens or subjects; and, finally, whether the collective personality was merely a means towards the individual purposes of the members or was at the same time a purpose in itself. Gierke applied these considerations to the institutions of the Middle Ages and deduced therefrom the importance of the political union for the extension of the state conception which was eventually developed "to the conception of the federal state commonwealth,"[2] dependent partly on the state right of the "federal personality" and partly on the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, pp. 846–847.

[2] Ibid., p. 854.

"federated personality of the members." He asserted that, although the whole as well as every member was not the whole, nor were the members the whole, "the territory Land," as a person composed of two members, was "an actual state."

In short, Gierke thought that the state idea had begun in every respect that dissolution of the patrimonial system which had been completed only in his own time, and its replacement by a public territorial state law.

But the territory was a "state in the characteristic form of a collective personality, which developed from the organised union of an institutional and of a corporative unity." At the same time it was not a mere commonwealth like the town; but there were incorporated in it two different elements, each having its own particular legal form.[1]

When the territorial authority constituted of its own right and the territorial community resting on a corporative basis combined together into a higher organism, then the personality of the territorial state came into being.

The attainment of the final goal of a completely unitary state authority and of general and equal citizenship depended on the destruction of this dualism of state personality. Had both factors in the territorial state been conscious of their task and kept the idea of community, there might have been steady if slow development into the modern state. But the old territorial communal entities degenerated through estate and corporation egotism into privileged bodies, and the further development of the state was left to the hostile and everywhere successful territorial powers.

Thus there was formed the purely authoritarian state in which all creative effort came from the territorial lord (*Landesherr*) and in which the territorial community appeared only as "an anomalous hindrance to state development," until at last the territorial authority became the sole embodiment of the state conception and the estates were driven out of any share therein.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 860.

To Gierke the authoritarian (*obrigkeitliche*) state was therefore the embodiment in a person of the highest collective will. Its personality existed solely in the authoritarian institution of which the territorial lord was the visible embodiment. The "state" was consequently completely identical with the "state authority" and simply an "institutional person." It was a single will, transcending the people and derived from above, in existence and form independent of any collective will. So Gierke asserted that in it there was "no citizenship forming the basis of the state will, but merely a body of subjects possessing no will of its own and controlled by an external will."[1]

Gierke held, however, that even when the authoritarian territorial state system was being most completely applied the old German conception of personality was sufficiently strong to prevent the lasting victory of the foreign conception of the state, and so the idea of the legal state (*Rechtsstaat*) endured, and the new creation of modern times was linked up with the old national legal ideas. The modern constitutional state took over from the absolutist state the hard-won unity of the state entity, but made the nation, organised on association principles, into one of the foundation-stones of the new state. The modern state, therefore, like the mediaeval commonwealth, is based on the combination of institutional-authoritarian and collective-national elements into a highest legal personality.

In Germany in all times "the Empire was the expression of the idea of the German collective state."

In the mediaeval period the Empire was regarded as an "ideal collective personality."

But although in theory the Empire was given the status of an independent German state, it was actually far more like a semi-international union than a federal state.

In the history of the modern German theory of the state the old Empire had no real importance. The territorial states became more and more the practical application of the idea of the state, while the Empire was considered simply as in part an external check upon

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 861.

them, and in part as an instrument of their own individual purposes. The Empire became at last a mere corporation of states, and its dissolution marked the fulfilment and completion of the state conception. So the new German Empire of 1871 could take from the old Empire only the traditional basic idea of a German collective state. The idea of the new German Empire derived its content not from the idea of the old Empire but from the idea of the state as it had been developed in the territorial state.

Gierke therefore emphasised the fact that the new Empire of 1871 was not a continuation of the old Empire, but was "a new-born state personality of modern times which undertook with youthful power the task which the old Empire was not able to fulfil." The new Empire was to be in fact what the old Empire had been only in theory—the "state personification of the German people."[1]

§ 6

Passing next to the commune, Gierke defined this as "a compulsory union, existing for state purposes in one part of the state territory," which had "its own personality occupying an intermediate position between the highest generality and the single individuals."

The commune in this sense did not exist before the establishment of the conception of corporation. It is true that there were unions which in fact fulfilled the functions of the communes, but the communal element in them was indissolubly mingled with the undeveloped embryo of the state on the one hand and with the "property association relationship" of the old economic commune on the other. Yet the conception of the commune as such was latent in the old conception of association.[2]

Gierke argued that since the introduction of the conception of corporation into German life that of association in the legal sense must be understood differently and in a more restricted sense than before, in two respects.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 862. [2] Ibid., p. 862.

Firstly, the hitherto open question as to whether an association union was a special legal entity by itself or whether it was merely a legal relationship between a number of persons was definitely decided.

Only to the first case could the term "association (*Genossenschaft*)" be technically applied; in the second case it could at most be called an "association community relationship."

Associations of the old kind therefore fell into two classes—"corporative (*Genossenschaften*)" and "legal communities of an association type."

Secondly, the state and commune gradually separated themselves from the other association unions. In form they were on an association basis, but at the same time they were more than mere associations. They appeared as a particular species of corporation, and consequently the conception of association in the technical sense could be applied only to the other corporations.

Therefore Gierke assumed that the conception of association was now only a "species conception" covering those German legal corporations which were neither states nor communes. In relation to the conception of corporation it was a sub-conception.[1]

It is in the first place an expression indicative of the particular form taken in German law, as contrasted with other law, by the conception of the corporation. And, secondly, it is identical with that German conception only in so far as it leaves out of consideration those corporations which could become state or communal entities.

As regards the political nature of the basis of a corporate existence, Gierke pointed out that there was a very great difference between corporations which were the result of evolution and those which were the result of deliberate action.

In the former case the unitary existence of the union was a natural or historical fact. To Gierke free will had brought about not the fact but only the manner of the incorporation of the plurality into a unity; that is, the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 866.

will was not creative but only formative. This was the case with the state and the commune, and with all historico-political associations of a corporative kind, such as the *Mark* association, unions for the regulation of embankments and drainage, and many political corporations, and the family associations which existed among the higher nobility and elsewhere.

In the deliberately formed associations, on the other hand, the collective union existence was entirely voluntary. According to Gierke, it was a creative act of will which brought such a corporation (of which the chief example was the Gild) into being.

The organisation of the German corporate association depended on the formation of a unitary organic body from elements constitutionally separated off from the individuals so united. In contrast to the old association entity the idea of the "constitution" became, after the idea of corporation had been fully developed, something entirely apart from the sphere of subjective legal relationships, and appeared as the essential mode of the law.[1]

The essential purpose of all corporative organisation was the "making of the union into a living collective personality." All the advances which led from the old association system to the new corporate association system were due to the perception and legal recognition of the unity immanent in the association as a person. Thus the collective personality of association was wholly analogous in its internal nature to the personality of the town.[2] So Gierke laid it down that the association as such had all the characteristics of complete legal personality, that is, it was legally capable of will and action. Whilst the association was a unitary person, it also was a "collective personality" which had its life in a plurality. Therefore the relationship of unity and plurality in the German association was by no means that of "opposites," but was one of interdependence.[3] In this respect the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 880.
[2] Ibid., p. 886. [3] Ibid., pp. 905–906.

distinction of the association of German law from the *universitas* of Roman law was the outstanding feature of Gierke's doctrine.[1]

The completion of the corporation conception resulted indirectly in the elucidation of the legal nature of those communities which were not of a kind to be included among the corporations. If it were once established that the unity in collectivity was capable of being a separate legal entity, then for every community the existence of a personality of the whole, distinct from the plurality, must be either affirmed or denied. The non-corporative communities must be considered to be individual legal relationships involving a number of persons, and as in the corporation the unity obtains a separate sphere of existence, so in the non-corporative communities the subordination of the whole of the common spheres to the ideas of the plurality of persons becomes complete.[2]

Gierke considered the development of the conception of "institution" as having been parallel with that of "corporation," meaning by "institutions" those unions which could not be included in the corporations and whose independent life was derived from a source external to themselves but were yet endowed with personality.[3]

The history of the corporation in Germany goes back to the primitive dualism of association and lordship.

As both the corporation and the institution had room within their constitutions for many kinds of unions different from their own, it will be readily understood that the two legal institutes frequently came into close contact; many intermediate forms filled the theoretical gap between them, and one form could gradually in course of time change into the other—as, for example, the universities developed from voluntary associations of learned men, orders from religious brotherhoods and state institutions from small communities.

In modern times independent corporations of public law were created anew out of territorial communes which

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 906.
[2] Ibid., p. 923. [3] Ibid., pp. 958–959.

had been deprived of all corporative character, out of purely state divisions such as districts and circles and out of many other unions originally organised predominantly as institutions.[1]

But large as these modifications were, for the decision in principle as to the nature of any particular institute regard must be had to the historically developed distinction between the association and the institution. That is to say, in the case of every unity recognised as a legal person superior to individual men it is necessary to find the answer to the question "whether having regard to its positive legal development and form it comes within the conception of the corporation or that of the institution." As the concrete legal facts were modified by these antagonistic conceptions, it was possible for there to be institutions with corporative constitutions, and corporations with institutional entity. To the former the term "institution" could be applied; the "institutional unity outside the collectivity" is with them the primary and decisive characteristic and the corporate union of the collectivity is derived and subordinate.

The comprehensive survey of the German *Genossenschaftsrecht* is the description of the progress of human organisation from association to corporation and institution, the interdependence of which is the basis of Gierke's system.

[1] Gierke. *Das deutsche Genossenschaftsrecht*, II, pp. 973–974.

CHAPTER III

GIERKE'S THEORY OF HUMAN ASSOCIATION IN RELATION TO LEGAL AND ETHICAL THEORY

§ 1

I WILL describe here Gierke's fundamental conception of the corporative personality and theory of organism, as it is best set out in his lecture of 1902 entitled *Das Wesen der menschlichen Verbände.*

At the outset, discussing the interrelation of all the sciences, he said: "It is evident that the boundaries of any individual science are only internal boundaries within the immeasurable realm of one science." At these boundaries, however, each separate science becomes conscious of the common boundaries of all human knowledge, for it reaches the point when it cannot alone penetrate into the realm of the eternal verities which are hidden behind the world of phenomena.[1]

Gierke, however, unlike the English jurists, attempts to consider the problem of legal science which is rooted in moral science and associated with natural science. He ventures to do so "under a certain inner compulsion," because this problem had been the starting-point and remained the central point of his whole scientific life-work.[2]

That point was the problem of the units of human association; "the question of the nature of the entirely dissimilar structures which we include in the category of

[1] Gierke. *Das Wesen der menschlichen Verbände.* Leipzig, 1902, p. 1.

[2] Gierke himself has laid emphasis on the fact of the relationship between the phenomena of historical civilisation and the traditional and *a priori* basis of law, and clearly distinguished the conception of law from its historical manifestation. But with great lucidity he has set the philosophical mode of consideration of law side by side with the enumeration of its history. "The historical development of law needs the addition of a philosophical theory as to its nature, basis and purpose." Gierke. *Die historische Rechtsschule und die Germanisten,* 1903, p. 34.

associated bodies and to which we ascribe thereby a common characteristic which the highest manifestations of state and church share with the smallest community and the loosest association."[1]

In this respect Gierke assumes that legal science is forced for two reasons to occupy itself with the nature of human association. Firstly, the law is a part of the life of the community. Legal science cannot concern itself with the origin of law "without reference to the creating community."[2] According to him legal science must answer the vital question whether law is created by the state alone, or by another union in the form of an autonomous pronouncement, or even by an unorganised community in the form of customary law; it must ascertain the position in relation to the community of the individuals who are active in creating law; and, finally, it must throw light on the relationship between the internal and external sides and between the logical expression and the exercise of wills in the process of legal creation. Those problems are naturally insoluble without the investigation of the functions of law in the common life of the community and its relations with the other functions of that life, i.e. without "a definite idea (presentation) of the nature of the human community."

In this respect, however, Gierke asserted that for legal science "the conception of the community is not an independent goal of knowledge, but only a means of obtaining insight into the nature of law."

Consequently for legal science the problem of community is that, the law being a part of community life, the "legal system embraces not only the external relations of individual life, but it regulates also the lives of states, churches, communes and associations," and according to Gierke does not content itself with determining the "norms" for their external relations but rules and penetrates into their inner lives.

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 2.

[2] The *Genossenschaftstheorie* forms "the attempt at a complete reconstruction of the theory of the legal nature of human association." Gierke. *Die Genossenschaftstheorie*, p. 4.

Therefore Gierke contended that the enquiry as to the nature of unions is for legal science not merely a preliminary problem but an essential problem; in other words, "in order to understand and to evaluate that part of law which constitutes the life system of communities, one must try to realise what it really is that enters into law and receives its system from it."[1]

German positive law deals with the organised communities as unitary beings, to which it ascribes personality. They are described as "juristic persons" and "are, just as individual human beings, subjects of rights and duties." But doubt arises as soon as one begins to enquire what actuality is at the basis of this phenomenon of law. And on this point Gierke pointed out that juristic theories differed.

The opinion was still widely held, especially by the thoroughgoing adherents of the individualist conception of society, that the juristic person is a fiction established by the law for definite purposes, or, as Gierke called it, "an imaginary unity—a creation out of nothing."[2]

The argument was that reality presents to us only individuals as self-contained subjective unities; each union is itself only a sum of individual human beings, standing in special relations with one another, and to which from the objective standpoint one ascribes just so much unity as one chooses. "In any event the union lacks in reality that corporeal-spiritual unity by means of which the individual is by nature made suitable, and is called on, to be a legal subject." The individual has personality because he has full volition; unions as such cannot will and act. But Gierke pointed out that this is not sufficient for law, which needs unitary holders of the aggregate of rights and duties, constituted for common interests and serving as central points of union for the spheres of community which are outside the sphere of power of individuals. Gierke thought that it makes use of sovereignty and utilises the fiction already available in order

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 3.
[2] Ibid., p. 4. Gierke. *Deutsches Privatrecht*, I, pp. 460–461.

to create the subjective community unities which it requires.

To Gierke it seemed that in its crudest form the fiction theory regards the new subject of law as an artificial individual, which as a mere conception leads a shadowy existence and in its incapacity of will and action resembles a child or a lunatic, or gains a second-hand capacity of action through the guardianship of natural persons. Alternatively the poetic colouring of the *Homunculus-Schöpfung* is stripped off, and the fiction means only that an impersonal thing is treated as if it were a person, or has only the effect that a plurality ranks in law as a unity.

He denounced the idea of the fictitious person as a "scarecrow," because, as law without subject is a contradiction in terms, the purpose becomes an artificial subject also. And finally, if only individuals are unities endowed with will, they alone can be subjects of rights and duties, and all association law is at most the collective right of many, and all systems of community are only a network of relations between individuals.

From his fundamental legal conception he deduced that "the consistent individualistic theory could admittedly not strike out even from private law the conception of the juristic person, since it is legally established therein, but it allots to it only the value of a technical aid, a collective name, an abbreviating formula." But public law had a free course.[1] And particularly in respect of constitutional law some adherents of this basic theory declared a war of annihilation on that conception of state personality in which modern constitutional law supposed it had found its sheet-anchor. As a matter of fact, as applied to the subject of the highest earthly power the idea of *persona ficta* was bound to prove itself particularly untenable. Carefully examined, the individualistic state theory and the power of abstraction fail altogether to differentiate, in the legal position of man, between "what has its centre in his individual life and what refers to a centre in the common life." This differentiation

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 6.

between two legal spheres appeared to Gierke to be the main content of the progress of the history of law. It was only very gradually and laboriously, and with many setbacks, that the idea of the independent personality of the organised whole came to prevail. Constantly the state personality threatened to be absorbed into a single sovereign ruler or a sovereign national collectivity.[1] This tendency found expression in Louis XIV's saying: "*L'état c'est moi*"; and in the tendency of the apostles of popular sovereignty to confuse the state with the aggregate of the citizens.

But gradually from the conflict of opinion there emerged, stronger and more precisely, the idea that the "immortal state is itself the real subject of sovereignty." Gierke asserted that it was this which inspired Frederick the Great, an absolute monarch who yet declared that he was the first servant of the state. The idea became the guiding star of jurisprudence in creating modern constitutional law, with all it involved. And this idea developed all its formative power when during the nineteenth century in the constitutional or legal state popular organs were called upon to co-operate systematically in the exercise of the state power. So it had become an essential part of modern civilisation, from which no amount of logical argument could take it away.[2]

The question, which Gierke seeks to solve, is the personality of the union, which is by no means a spectral shade but a living being; that is to say, "Are not associations of people real unities which by the attribution of personality to them by the law receive only something that corresponds to their nature?"

Gierke's unhesitating answer was an affirmative. And he thought such an answer must be given by everyone who had broken away from the individualistic conception of society and regarded human collective life as a life of a higher order, in which individual life is incorporated.[3]

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 8. [2] Ibid., p. 9.

[3] Ibid., p. 10. "Therefore the Germanic law could not, like the Roman law, start from the co-ordination of an absolute will system of the state and an aggregate of sovereign individual wills. Its starting-point must be rather

He explained that since the science of state and law was formulated there had been two conflicting ideas: the first that the community is merely an aggregate of individuals, and the second that each body social is an independent whole with a being of its own. The latter idea had the pre-eminence in ancient philosophy and the social theory of the Christian Middle Ages was permeated by it. It did not die out, but was driven into the background by the victory of the natural law theory of society with its derivation of the existence of the union from the combination of individuals. The idea of state and law appeared with renewed energy after the end of the eighteenth century, when Fichte in his social theory showed the way from the purely natural law individualism to the view of the actuality and own-value of community. From that time onward, in philosophical thought as a whole from Hegel to Wundt, in the doctrines of the historical-legal school, in the young sciences of cultural history, of racial psychology and collective sociology, this ideology has made its way.

The victory of the idea of evolution in the natural sciences had the effect of strengthening the position. It was quite true that its opponents were still not wholly disarmed and that there was a great difference between the ideas of the nature of the super-individual unity obtained by metaphysical speculation and those which (with more or less imagination) were derived from observation. Whilst they had on the one hand been spiritualised, in that "the reality of the concrete collectivities (*universitates*) could for a long time be incorporated with the reality of the abstract conception of species (*universalia*) formed by Platonic idealism, and therefore

a unitary conception of will, which comprised at one and the same time the characteristics of freedom and restraint, of egotism and altruism, of individualism and collectivism. Therefore the soul of the Germanic personality was constituted by the free but ethically bound will that is the ethical free will. And personality consisted in the recognition of an ethically free entity as the possessor of right. . . . There was no distinction in principle between the individual and the collective will-power." Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 33.

involved in the overthrow of realism by nominalism"—on the other hand they had become strongly materialised, in that the treatment of bodies social was possible as if they were mere bodies natural like a piece of coral made of numerous individual zoophytes.[1] But from both these antagonistic standpoints there was a glimpse of some reality of union-unities. It was of course still possible that this was a delusion, but it did encourage one to assume the union-unity as a hypothesis for the problem of legal union-personality.

Gierke therefore started from the assumption that the legally ordered community is a whole in which a real unity is embodied, and proceeded to enquire, by means of law, how this whole must be created if the actuality was to be mirrored in the law.

The law ascribed to the union personality. Therefore "the union, like the individual, must be a living and spiritual life unity which can will and can put what it wills into action."[2]

But he assumes that the law rules and permeates the inner structure and the inner life of the union, and consequently "the union must, in contrast with the individual, be a living existence in which the relationship of the unity of the whole to the plurality of the parts is subject to regulation by external norms of human will."

These are, according to Gierke, the fundamental ideas from which the so-called organic theory evolved. That theory trailed its way through the political ideas of antiquity and the social doctrines of the Middle Ages, and it accompanied all attempts at an overthrow of the atomistic-mechanical conclusions within the world of thought of natural law, but it was only in the nineteenth century that it was scientifically elaborated under the impulse of the new ideas as to human collective life.

Gierke rejoiced to think that the organic theory considered the "state and the other unions as social organisms" and "maintained the existence of collective

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 11.

[2] Ibid., pp. 11–12. Gierke. *Die Genossenschaftstheorie*, p. 51.

organisms (whose parts are men) above individual organisms."

At first it included in a single species only phenomena in which it discovered common characteristics, but as the conception of the organism is originally derived from the individual living being, the theory found itself compelled to compare the organism of society with the individual organism. This comparison, according to Gierke, is very old and had imposed itself upon men's minds quite independently of thought. It had left indelible traces in customary speech and even underlay technical legal expressions. Thus one speaks of a social body or of a corporation of the head and members of a union, of its organs and functions and so on. Therefore there must be a real analogy. Though these comparisons had been made by Bluntschli and his followers, Gierke pointed out that more recently natural science likes to take the opposite course and in order to explain the individual organism to draw a comparison with the state. As an instance he referred to Hertwig's lecture of 1899 on the organism and its relation to science, in which the assertion was made that it is natural for the biologist to see in the state the highest kind of organism, and there was a convincing parallel between natural and social processes of life.[1]

But according to Gierke a "comparison remains only a mere aid to knowledge" and "can illustrate but cannot explain." If it is used in order to draw from the agreement of certain characteristics conclusions as to other characteristics in which there is no apparent agreement, then it is a source of error. Even the organic theory was not free from such transgressions, including the anthropomorphic construction of the state which has taken many forms since Plato's attempt to conceive of the state as a man grown large, and to base the three-classes system of his ideal state on the relations of the moral powers.[2]

[1] Gierke. *Das Wesen der menschlichen Verbände,* p. 13.

[2] Ibid., p. 14. "In regarding the state as a man, Church as a woman, their marriage is not always a happy one." Gierke. *Das Genossenschaftsrecht,* III, pp. 514–515.

He pointed out that from another sphere of thought there emanates the theological-juristic idea of the Church as the mystic body of Christ. St. Paul represented humanity as a single body united in Christ and imbued with the spirit of God—as a body with many limbs, each valuable in its own way to the whole.

Gierke considered that as this allegory applied to the external organism of the Church and, in accordance with the connection given to it by the Apostle, to the communion of the Body and Blood of Christ in the Lord's Supper, in the sense that the sole means of bringing the members into unity with the Head is the mystery administered by the Church, the conception of the *corpus mysticum* acquired a juristic impress by virtue of which "the earthly legal subjectivity of the Church and its parts appeared as an established unity of supernatural origin."

And in regard to the state there has been no lack of theories which ascribed its quality as an organism to a transcendental inspiration. Conversely, in recent times organic social theory has often taken a one-sided natural science direction. By the analogy with natural bodies people were misled into treating association-bodies also as purely natural creations. Like Bluntschli they talked of the anatomy and physiology of such bodies and sought to trace out their nature by the methods of natural science. Gierke acknowledged that, as all association-life had a natural basis, one could in this way obtain successful results up to a certain point. But the limits of the permissible application of the comparison were exceeded if one confined within the limits of a social nature-theory the spiritual ethical community that grows up on this natural foundation, and took the cell-state of plants and animals as a prototype for organisms whose members are human beings with free will.

To Gierke it was quite understandable that critics of the organic theory should fasten on the excessive claims made for that method of comparison. He himself had already indicated that critics of the organic theory are quite right to attack these exaggerations, "but they are

wrong if they regard them as inevitable consequences of the comparison of natural and social organisms. Rightly understood, that comparison means only that in the body social we see a living entity of a whole made up of parts, the like of which we observe elsewhere only in the living beings of the world of nature." He added that "we do not forget that the internal structure of a whole, whose parts are human beings, must be of a kind for which the natural whole does not provide any models; that in this case there is a spiritual collocation which is set up and shaped, actuated, and broken up, by psychologically motived action; that in this the realm of natural science ends and that of moral science begins."

Nevertheless Gierke conceived that one considers "the social whole, like the individual organism, as being alive" and classes "the common existence together with the individual existences in the conceptional species of living beings." So far as there is anything figurative in this, it is due in part to the need for distinctness, and partly to poverty of terminology. So he asserts that "we may make use of the figure even in science, if we remain ourselves conscious of this and do not take the figure for the thing. But inasmuch as for the description of the thing itself we can make use only of expressions which still retain their figurative stamp, we must take care to distinguish between the concept content and the figurative form."

But Gierke pointed out that even when the organic theory limits itself in this way, it has been reproached by its opponents with going beyond the boundaries of science. The assumption of unities of life beyond the life unity of the individual is declared to be mysticism, for "our sensual observation shows us only individual human beings."[1] So it is asserted that "he who attributes an independent life to invisible unions introduces into visible reality an element which is beyond our perception." This line of argument seemed, despite its shallowness, to be quite wanting in clearness. It is a mistake to suppose

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 16.

that the sensual observation should tell us nothing about the being of unions, for the life of the union manifests itself in corporate wholes which present themselves as external phenomena. Taking the example of the march of the regiment with its band, and the electors who throw the ballot paper into the ballot box, Gierke remarked that in these and numerous other sensual impressions we recognise at once that these are occurrences connected with the life of the state, though "admittedly it is only individual parts of the state body that we see." Gierke, as a pluralist, points out that whilst "we perceive clearly the corporate figure of the individual human being as a whole, we are not able to look at the corporateness of the state as a whole." It cannot be presented to us by the artist except as a symbol. But this is not an objection to the actuality of the body social, because to him "the insufficiency of the senses to receive the total impression is not a disproof of the thing's existence." We never doubt the roundness of the earth, though we see only trifling pieces of it. It is indisputable that however much or little of the unions we may see, we do not see their life unity. "What the senses convey to us are only movements of the body."

If we interpret those movements as the effects of a life unity, we are arguing from the visible to the invisible. If we attribute personality to a union, we combine the quality of being a concrete subject with this invisible unity. But Gierke observed that this is equally true of the individual human being; his personality is beyond sensual perception. And his personality is "an attribute given to this unity which is indivisible and only deducible from its operations."[1]

The idea that "one can perceive the individual personality with the physical eye" he declared to be a serious mistake. The personality of a man remains the same though his visible body is changed; i.e. it does not undergo division or loss if a physical member is cut off from the body. And least of all is this physical perception

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 18.

able to recognise to what extent the man as an individual is self-contained and to what extent he is incorporated in a social whole as a member or organ. In other words, Gierke said: "Wherever we are occupied with the idea of a unity operative in a living existence and different from the sum of the parts, we are moving in an invisible world." In doing so, are we leaving the ground of reality? Gierke thought not.

Finally, to the organic theory it is objected that by introducing something unexplained it is only making more obscure what it is seeking to elucidate, i.e. the nature of physical organism. So that the bringing in of this unknown something is of no advantage to social science.

In dealing with this criticism Gierke based his argument on the relations between actuality and thought. He held that "we must put what we recognise as actuality into our conceptional world, although its essential nature is unexplained and perhaps not explainable." The riddle of organism is the same as that of life. We do not know what life is, but we cannot deprive science of a conception of life, because we know that "life exists" and "we can ascribe and limit the phenomena of life." So we form a conception of life of which it is possible to make use in both the physical and moral sciences.

Wherever life exists, a holder of life is to be found, possessing particular characteristics. Gierke declared that "this holder of life is a systematic whole admitting and excluding parts and maintaining itself as a whole by the appropriate co-operation of the parts—as a whole, that is, of which the unity, constant through the change of parts and operating in the working of the parts, does not coincide with the sum of the parts."

That is Gierke's main conception. Admittedly the precise nature of this unity in plurality is hidden from us;[1] nevertheless we cannot strike out from science the subjects of the life processes, for it is certain that they exist. We can determine and describe the specific

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 19.

characteristics of the possessors of life, and so formulate a conception of the holder of life and consequently make use of the term "organism" as indicative of the kind of structure possessed by the living whole. On this point Gierke asserted that "this conception is as scientifically applicable as any other conception which is gained by legitimate abstraction from the known facts, and thereby explains appropriately a content of actuality."[1] Its legitimacy does not depend on the explicableness of the basic actuality. And so Gierke thought that we are entitled, and are indeed bound, to apply it to social wholes if we see in them unitary possessors of life.

But it is not sufficient to rebut criticism of the assertion of the existence of social units; it is necessary to produce positive proofs. And to these Gierke now turned.

Obviously there is no direct evidence of the existence of social life-units; but there is indirect evidence, and we can deduce that existence directly from its effects. The conviction that such evidence carries varies from one person to another, according to their views of the universe; but after all even the most apparently sure bases of scientific knowledge are simply well-founded hypotheses. External experience is the primary cause of our acceptance of operative life-units. "The observation of the processes of society, by means of which our life passes on, and especially the study of the history of mankind shows us that it is the actions of nations and other communities that shape the world of power-relations and promote material and intellectual culture." As communities consist of individuals this all takes place in and through individuals. And Gierke asserted that "in so far as the action (doing) of the individuals belongs to the social collectivity, they are determined therein by the physical and spiritual reactions which result from their association." As to the relation between individuality and collectivity very differing opinions can be held; there can be a one-sided cult of the hero or a one-sided collectivist view of history; but the constant reaction of these two factors must not

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 20.

be ignored. In any event, Gierke declared, "the community is an active something."[1] And he stressed the point that the effects which we ascribe to the community are not of such a kind as to be explicable as a mere sum of individual powers, because they cannot be produced sectionally by the separate individuals in such a way that the collective action would be merely a whole like to, and only quantitatively greater than, the sectional actions; but they are of a special kind. This is obviously the case with all the phenomena of the organisation of power, law, morals, national economics and language. As Gierke was a pluralist, he indicated carefully that the active community is not coincident with the aggregate of individuals who form it, but "must be a whole with super-individual unity of life." Consequently one does not go beyond the bounds of external experience in deducing from the facts of the history of civilisation the existence of association units. And from this it follows that we are entitled to apply to the whole field of the social sciences that conception of such unity which we have derived from the ascertained content of actuality.[2]

Then Gierke proceeded in his argument from external to internal experience, because, he said, "we find the reality of the community also confirmed by our inner consciousness."

He asserted that "the incorporation of our Ego in the social being of a higher order is for us an inner experience." We feel ourselves to be "a self-contained self, but also a part of a living whole acting in us." He says, "if we could think ourselves free of any connection with a particular nation and state, a religious community and church, a professional association, a family, and unions and associations of many sorts, we would not recognise ourselves in the pitiable remnant that would remain." It is not a matter only of external chains and bonds, but of psychical connections extended to our inmost being and forming integral parts of our spiritual nature. We find that a part of the impulse which deter-

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 21. [2] Ibid., p. 22.

mines our conduct derives from the communities which permeate us.

He explained that if we create from our internal experience the certainty of the reality of our Ego, this certainty extends not only to the fact that we form individual life-units, but also to the fact that we are part-units of higher units of life. But we cannot find in our consciousness these higher units of life, because we are only parts of the whole, and therefore the whole cannot be within us.

We can then deduce directly from inner experience only the existence of units of union, and nothing as to their form. Indirectly, however, we can conclude from the community activities within us that social wholes are of a corporal spiritual nature. For, according to Gierke, these activities consist in psychical processes endowed with corporeal life. And consequently we talk not only of bodies social and their members, but also of the national soul and will, of the class-spirit and family-spirit, and so on, meaning thereby "very vital psychic forces," the reality of which we feel not least if we try to make use of our individuality to resist them. "But there are times at which the sense of community reveals itself to us with elemental force in almost visible form, and so pervades and masters our inner being that we almost lose the sense of individuality. Such a sacred time was experienced by me in Unter den Linden in Berlin on the 15th July, 1870."[1]

Therefore Gierke believed that the acceptance of an actual corporeal-spiritual unity is scientifically justified. But scientific knowledge does not go beyond this and cannot reveal the actual nature of these living unities. He declared that "the metaphysical necessity of a unitary world-image will not die out, and from the mingling of knowledge and faith there will always be born attempts to solve the riddle of the universe."

Gierke held that "the individual sciences may not indulge in speculation as to the transcendental." All they

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 24.

can do is to investigate the causal connection of the phenomena of their respective spheres and trace these to their ultimate operative factors.

Therefore the conception of the social life unity will play a varying part in the individual sciences which belong to the great whole of cultural or social science. And so he concluded that "each of the sciences, in so far as the phenomena treated by it refer to working active association-powers, will have to apply the conception and develop it in proportion to the basic requirements of its particular task." Applying this general argument to the problem of legal science, Gierke said that it was concerned only with those communities whose unity is expressed in a legal organisation, "These alone are called upon, or even entitled, to appear as persons in the sphere of law." Numerous communities with very active operative power are therefore excluded; especially the national community which has no state or is above the state, for the nation becomes a person only as being a state.

The social living unity of such communities, i.e. their nationality, is certainly as powerful a working factor in regard of law as it is of language and morality and all spiritual and material culture, and therefore claims attention from legal science. But Gierke argued that it does not take a place among legal subjects. The community of nations also produces law without being considered a subjective unity in law. The same applies to the religious community unless as a Church it becomes a person, and to organised social classes (estates), professional associations and joint-stock companies, and also to social and political parties unless they are also organised unions. "But wherever a community presents itself as a legally organised whole, there is presented to law the question whether and with what validity the social living unity is to be recognised as a union personality."[1]

It is true also that wherever the union personality appears there devolves upon legal science the task of understanding, co-ordinating and developing the legal

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 25.

principles appropriate to the external and internal union-life as the expression of the corporeal-spiritual living unity of the association organisation.

Does it then really matter to jurisprudence, as such, how the problem of the juristic person is solved? Is it not a merely scholastic issue, of which the solution is unnecessary so far as concerns the juristic understanding of the law and is in practice unimportant?[1]

Gierke's answer is that the whole systematic construction of law, the form and content of the most important legal conceptions and the decision of many practical particular questions depend on the construction of the union personality. And it is in this that the organic conception is assured that it alone is in a position to find what is suitable to, and in accordance with, our legal consciousness and our requirements in life.

If the union law is a life system for the social living being, then that part of association law which regulates the internal existence of associations must be fundamentally different from the law which regulates the external relations of the living beings recognised as subjects.[2] In accordance with the dual nature of man, who is an entity for himself and a part of higher entities, the law must be divided into two great branches which we may designate individual law and social law respectively.

Constitutional law and all other public law, and also that inner system of life of private union-persons which is incorporated in private law must indicate the type of social law. In it there are operative conceptions which are not exemplified in individual law.

In this respect Gierke explained that because, and in so far as, the internal existence of the social organism is at the same time the external existence of men or of narrower unions of men, law can determine normatively the formation of the living whole from its parts and the

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 26.

[2] Ibid., p. 27. *Deutsches Privatrecht*, I, pp. 533–550. *Die Genossenschaftstheorie*, pp. 175–176.

activity of its unity in the plurality of these parts. Thus the legal conception of the constitution emerges. The coalescence of the association body out of the people belonging to it is regulated by legal principles, and the legal conception of membership is thus produced. Membership involves a legal position consisting of rights and duties; the separate sphere of the life and work of the member person is legally limited in contrast to the individual sphere which remains free; by means of the regulation of its losses and gains the processes of incorporation and exclusion of the parts of the body are elevated to the rank of legal processes.

Gierke went on to argue that the membership of the body is determined by legal principles, in that every member person is assigned its place in the whole, domination and subordination are introduced, organisation into a connected complexity of membership is carried through, and possibly a legal position as ruling head is granted to an individual member.

Above all, legal principles determine the organisation by means of which the elements, thus bound up into a whole, form a unity.

Therefore he said that "since law determines the fact that the living unity of the whole attains to legal manifestation and the pre-requisites for this in the life manifestations of particular members or complexes of members, it stamps the conception of the organ as being a legal conception."[1]

But that legal conception of the organ "is of a specific kind and must not be confused with the individual legal conception of the deputy." "In this case," Gierke wrote, "there is no question of representation of a self-contained person by another self-contained person. But just as when the eyes see or the mouth speaks or the hand grasps, it is the man who sees, speaks and grasps, so if the organ functions properly within its competence it is the living unity of the whole which is directly active."[2] It is through

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 28.

[2] Ibid., pp. 28–29.

the organ that the invisible unitary personality reveals itself as a unit of will and action which observes and decides. The juristic person of German law is not a feeble entity in need of a legal representative; it is an independent subject operating of itself in the external world. It can do business, and, despite the strenuous resistance of the advocates of the fiction theory, the opinion has made way with increasing force in legal circles that it is capable of crime (*deliktsfähig*) and can be held responsible for wrong-doing.

But as it is a legally organised community, the internal spiritual processes, in so far as they are external processes for the organ person, are regulated by legal principles. Thus Gierke makes use of the theory of will in his organic theory, in that "law is concerned with the process of will in all its stages from the first impulse, with the conflict between the urge and the deliberation of the reasons for action, with the determination of the final decision, and with its transformation into action."[1] There is no prototype in individual law of the legal principles which exist in regard to deliberation, voting and taking of decisions, the consent of the organs summoned for common purposes, and the publication and enforcement of decisions. Here the idea of contract—by which subjects wholly distinct agree in regard to a common content of will, which they set up as the binding rule of their conduct—breaks down. Every agreement is in this case only the formation of a unitary common will out of the wills of the parts summoned to share in it; every determination of conflicts of opinion is only the establishment of the unity of will of the whole. Every unsettled conflict between the organs threatens the social organism itself with mutilation, crippling, destruction or even dissolution; if it overcomes such a crisis by the victory of force over the existing law, there is preserved thereby its actual unity, which has not created the law but only regulated it.

It is a peculiarity of social law that the relations

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 29.

between the unitary whole and its parts may develop into legal relations. A legal relation between the individual human being and his members or organs is "unthinkable"; but Gierke held that "on the contrary union-persons have rights in regard to their member or organ-persons which culminate in the state power as the highest law on earth and are contained in a series of numerous descending grades in every union-authority down to that of private associations." At the same time there are also rights of the members and organ-persons over against the union-persons of which they are parts—rights of participation in the institutions and properties of the union, rights of sharing in the formation of the general will, as well as voting rights and rights to particular positions up to the hereditary right of the monarch.[1]

All these kinds of legal relationships have a structure entirely different from that of the relations of individual law which can be formed between the same subjects as possessors of free spheres of action of their own, and in which even the state and the individual citizen stand in the same relation to one another as independent private persons. Even if individual law relations are interwoven with corporate collocations, they undergo a social law transformation resulting in special forms of property, material rights and indebtedness. According to Gierke the birth and death of the social entity are, from the standpoint of law, legal processes which cannot be interpreted by the concepts of individual law and therefore require a new world of social law concepts.

Therefore Gierke asserted that "the free will act which calls a union person into life is not a contract but a creative collective act."

Finally Gierke stated that "an extensive system of norms of social law is concerned with the incorporation of lower social organisms into higher ones and last of all into the sovereign commonwealth."[2] The unions have this in common with individual men that they can be at

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 30. [2] Ibid, p. 31.

the same time independent wholes, with their own living unity, and members or organs of more comprehensive wholes. But a new juristic world of concepts is opened up above all by the fact that the inner life of such members and organ-persons is subject to the legal influence of the collective organism.

Innumerable are the kinds of legally-ordered social organisms which our cultural development has produced in the process of far-reaching differentiation and integration. It is self-evident that the law which applies to them is not fundamentally the same but is fundamentally dissimilar. The state which by its sovereign completeness of power is put over everything claims for itself a right of higher grade. The church with its ideal mission claims to have its own law. So also the local communities have a system of their own. Gierke declared that each type of public corporation has its special complexity of norms. The private association right is divided according to differences of union-purposes and further according to the numerous varieties of union-form. And finally within the species each individual social living existence has a special law, corresponding to its own concrete individuality.[1] Indeed the great collective persons whose constitutional formation is a main content of world history have shaped and changed their systems of life, each for itself, so that a system of particular ideas of law dwells in every concrete constitutional or ecclesiastical law.

When there are such dissimilarities any resemblance may well seem to many people to be impossible. But even in physical nature the never-ending multiplicity and differences of kinds does not exclude the scientific recognition of a fundamental principle underlying their structure. So Gierke could assert that "we believe that in the legal consideration of social entities we can perceive a fundamental basic principle, of juristic structure, which runs through all social law."[2]

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 32.

[2] Ibid., p. 33. Cf. Conrad Bornhak. *Allgemeine Staatslehre*, 1896, p. 14.

Accordingly he held it to be certain that the organic conception of union held its ground in legal science. That science has to do with the social life unities only in so far as they develop in law, and must necessarily deal with them in a one-sided manner. Legal science must always remain conscious of this one-sidedness; it must always remember that "the living powers of association-organisms express themselves beyond the law in all their movements of power and civilisation, and attain their most powerful effects independent of the law and even against the law."[1] Therefore legal science must cede to other sciences the task of discovering the over-all combination, and of tracing out the operative unities. Only as it receives from other realms of knowledge information as to the activity of the community will it be able to claim that its perception of the legal development of this activity demands attention in every thorough investigation of particular social facts.

But whilst Maitland in England leaves the explanation of moral personality to philosophers, Gierke claimed that the jurist might be permitted to direct his attention to the ethical significance of the idea of the real unity of the community, for it is only from this that there springs "the idea that the community is in itself something of value."[2] "From the higher value of the whole *vis-à-vis* the parts there can be deduced the ethical duty of man to live and, if it must be, to die for the whole. If the nation is actually only the sum of the individual members of the nation at any time and the state is only an establishment for the welfare of the present and unborn individuals, then the individual may be compelled to give up power and life for them. But an ethical obligation cannot be imposed upon him. Then there passes away "that gleam of a lofty ethical idea which has in all times illumined death for the Fatherland." Otherwise why should the individual sacrifice himself for the benefit of a number of other individuals?

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 33.

[2] Ibid., p. 34. *Das deutsches Genossenschaftsrecht*, II, pp. 40–41.

For the ethical relations of individuals to individuals there is the commandment: Love thy neighbours as thyself. On this command alone extreme individualists of the idealistic type, like Tolstoi, would base the life of human society—yet they destroy the state and preach anarchism.

The religious completion of the commandment to love one's neighbour is the commandment to love God above all. It first builds up the kingdom of God that is not of this world. But Gierke held that it is also meant for the community upon earth; Love the whole more than thyself.

And this has meaning only when the whole is something higher and more valuable than the sum of individuals, if the common existence is more than a means for the purposes of individuals, and if that man does not live and die for empty names, who works and fights for the honour and welfare, the liberty and right of his people and state.[1]

§ 2

Gierke's approach to ethics is the juristic justification of the harmony between plurality and unity in all the activities of human association. In order to make his position clear I will summarise his general conception of ethics in relation to law, from his famous article *Recht und Sittlichkeit* in *Logos* in 1917.

Gierke rejected as superficial the hitherto accepted idea that the distinction between law and ethics lies in the presence or absence of external compulsion. That idea is due, he held, to a failure to realise that the essential nature of law is not, any more than that of ethics, its external enforcement. There are legal principles which are not enforceable, and these include the highest principles of constitutional law which put obligations upon the state authority as such, or on its highest organs, the monarch or the popular representative body, or limits

[1] Gierke. *Das Wesen der menschlichen Verbände*, p. 35.

their competence.[1] Many provisions of law are by their nature not directly enforceable but are ensured only by indirect enforcement, in that their non-fulfilment is followed by some penality, liability for compensation for damage done, or some other legal consequence. This applies to all obligations as to personal acts or abstention from such acts. But this consequential enforcement cannot undo the wrong which has been done, it can only offset it in some way, often only incompletely, whereas the provision of law lays down that the wrongful act shall not be committed.

Consequently enforceability is not a characteristic but only an incident of the law. In fact the law cannot create from itself its own external power of compulsion, which must culminate in the application of authority, compulsory enforcement, penalties or police intervention; it must be endowed with such power from outside. To-day it is first and foremost the state which puts its power at the service of the law. This is the kernel of its being, but the law invokes the aid not only of the possessor of the supreme earthly power but also of other associated bodies and even of individuals. It is for the law to justify in its own way the acts of power done for the purpose of securing the fulfilment of the law, and to lay down the conditions in which, and the limits within which, the application of such enforcing power is justified.

But Gierke thought that "external power as such remains for the law an acquired property; its original property is only the inner power innate in it and derived from the consciousness of law. Inner power is still *power*, and the law has it as long as that law is felt to be law even though deprived of external power or even subject to lawless power. There is powerless law, just as there is lawless power. But the inner power of law is lacking in ability to exercise an effect from outside, and exercises only a psychological compulsion. But inner power is inherent in the ethical law. That law works by means of a psychological compulsion, by virtue of an inner power

[1] Gierke. *Recht und Sittlichkeit. Logos*, Band 6, Heft 3, 1917, p. 222

which is rooted in the ethical consciousness, and by the compelling force of consciousness it may triumph over the strongest external power. Consideration of this inner power revealed, in Gierke's judgment, more affinity than antagonism between legal and ethical norms.[1]

He asserted that "the self-maintenance of community depends on every internal conflict ending always in conciliation." The possibility of working towards this goal is given by the strength that emanates from the central vital unity of the community; but the ability to attain the goal is conditioned by the unbroken energy of the life unity. This applies particularly to the separation of functions. Their separation, their sharp demarcation from one another and their independence in their own sphere cannot be diminished without harm to the higher culture which has been attained. But so long as the life of a nation is sound and its youthful vigour is retained it will pursue successfully the great task of re-combining organically what has been separated and of placing it at the service of the whole whilst maintaining its own individuality. Only the concordance of opposites in a unifying harmony guarantees a beneficial development.

Despite this criticism, Gierke thought that the introduction of the conception of power to elucidate the distinction between law and ethics does serve a useful purpose. Whilst compulsion is not essential to the nature of law yet the striving for enforceability *is* essential to it. The law seeks to prevail: it is content with voluntary observance of its rules, but it attains its goal of unconditional operativeness only to the extent that it is safeguarded against infringement of its rules. Therefore it desires external power, and it is felt to be proper to make its rules compulsory, so far as that is practical and not in conflict with higher interests. The more securely the realisation of the law is assured by the power of compulsion placed at its disposal the more complete is the law. And it is on this that there rests the correlation of the law and the state.

[1] Gierke. *Recht und Sittlichkeit*, p. 223.

The law obtains its completeness firstly by means of the state, which as the possessor of the highest authority forms and protects the legal system in the fulfilment of a task which it cannot reject. On the other hand the state becomes complete only through the law, which systematises the collective life of the state and gives sanction and stability to state relations of power, which without such action would have only a crudely material basis, by making them into legal relationships. State and law are not derivable one from the other. The state is not the offspring of law, as was believed in the theory of natural law; and law is not, as modern thinkers hold, the creation of the state.[1] Gierke held that state and law are equally original products of the community life inherent in mankind, and must be regarded as co-equal. But they have grown up together, each is dependent upon the other, and to-day more than ever each finds its own weakness made good by the other's strength.

But with the ethical law the position is wholly different. The ethical norms indeed claim unconditional validity, but any attempt to secure that by methods of external compulsion would conflict with the very nature of the norms. They desire to work only with their own means, and attain the end when, and in so far as, they obtain men's inward subjection. Admittedly ethical training does not disdain to make use of methods of external compulsion, but they are only aids to securing the desired moral effect.

So in regard to the state the sphere of ethics is infinitely freer and more independent than is the sphere of law. But this does not mean that the state, which is the possessor of supreme power, has not very comprehensive ethical tasks. Gierke said: "Our state is not a mere legal state, but it is a cultural state and has therefore to make use of its powers in order to promote morality and to combat immorality." And, however little it may be a builder up of morality, the state has to determine for itself what it will, from its own standpoint, regard as

[1] Gierke. *Recht und Sittlichkeit*, p. 224.

ethical or reject as unethical. And as it can make use only of external power, its influence can be only indirect; this is particularly so in respect of education, despite the magnitude of the ethical tasks which in that regard the state undertakes to discharge. It applies to the promotion of the religious life, the support of the churches, the protection and help of the work of societies for promoting morality, and the strengthening of family life.

Gierke considered next the doctrine that a distinction between law and ethics is that the former is the outcome of collective consciousness, and the latter of the individual consciousness. He pointed out that both the system of law and the ethical code are the creations of a social consciousness. The source of the dictates of law is the conviction, either unconsciously developed or consciously formed in a community, which finds expression either directly in the actions of people or in the pronouncements of some appropriate collective organ. But the source of ethical rules is also an unconscious or conscious collective conviction which finds expression in social conduct or in formulated ethical requirements. In both cases the commands and prohibitions are in substance pronouncements of reason as to a community of wills, whose content is determined by the general outlook at the particular time, and therefore is subject to change. The individual conviction of one or several members of the community may indeed not be wholly in accord with the collective conviction—it may even be in acute conflict with it; but however great the merit of that individual conviction, when looked at from the more general standpoint it cannot claim the status of a valid rule unless and until it is accepted generally. It is obviously true that creative ideas, which lead to a change of law or of the ethical code, are the product of individual minds; but in both spheres the individual only establishes the super-individual in so far as it becomes a collective organ, instils its own self into the collectivity, and continues as an element of the collectivity whilst maintaining its own individuality.

Between law and ethics there are differences of many kinds. A result of the power inherent in a formal law to create a sense of law in those to whom it is addressed is that quite arbitrary commands, if clothed in the form of law, may obtain the force of properly valid laws. And on the other hand it is obvious that in the sphere of ethics outstanding personalities exercise a stronger and deeper and more far-reaching influence in the sense of raising their ethical demands to the level of general standards—this is particularly instanced by the founders of religions. But these differences are, Gierke held, only of degree and not of kind.

Gierke discussed next the idea that the distinction between law and ethics is that the dictates of the former are addressed to men as members of a community, those of ethics to men as individuals. In criticism of that idea he pointed out that the law not only orders the relations of men to one another in their association for common purposes, but guarantees to every individual a sphere of freedom, in that it attributes to him a self-contained personality having a purpose of its own. It therefore divides into "social law" and "individual law," which extend each other and are interwoven, and of which neither can surrender its independence except with result of individualistic dissolution or socialistic petrifaction. The ethical law, for its part, addresses itself to the individual as the possessor of something which is of the utmost value, but at the same time it assigns to the individual a sphere of ethical obligation in his social environment. Ethics indeed divides—as is now generally agreed—into individual ethics and social ethics.

The law applies also to associations; it is binding on the members of the association as such *vis-à-vis* the association. "In the modern legal state the absolutist theory which puts the state over and outside of the law no longer prevails, and, though the state may be formally the supreme framer of the law, yet it recognises that the law is a restraint upon its action. It of course ascribes to the rules of law which regulate its own being a higher

status and a more pronounced quality—in so far as it represents a whole which is superior to its individual and association members, and gives a measure of such higher status to those associations which it regards as especially useful to the collectivity and therefore recognises as "public' corporations or institutions." This was to Gierke the great contrast between public law and private law. But the former is still law, and this characteristic becomes more definite as the structure of the legal state becomes more complete.[1]

But does the ethical law apply in the same way to associations as to unitary collective persons, or is at any rate the state exempt from the ethical law, so that it is the superman, enthroned above good and evil? To that question Gierke's answer is that whoever has ethical tasks has also ethical duties. To free the state from ethical obligation would be to destroy its ethical nature. But the problem of the ethical limit to the formal omnipotence of the state cannot be solved by mere reference to the ethical norms which apply to individuals. "The ethical norms, which apply to the state, must have a partially different content. There are private ethics and state ethics; to create a body of state ethics is a task which is difficult and not yet completed." In this connection it must be borne in mind that external self-preservation is an ethical obligation for the state different from that of the individual, that its existence as an organised power gives to its struggle for the maintenance and enlargement of its external power the character of a struggle for the fulfilment of its life task, and that to it the growth of its power means the development of its inner personality. Consequently its ethical code may have to differ from that of individuals or lesser associations, though it does not follow that the state may make use for its own purpose of *any* means, as Machiavelli asserted and others have more or less openly avowed. Even state ethics must reject the doctrine that "the end justifies the means"; the state is bound ethically as well as legally, it may incur ethical

[1] Gierke. *Recht und Sittlichkeit*, p. 226.

guilt and atone, though it may be too late, for its wrongdoing.[1]

This idea is Gierke's ethical basis of the state, from which his ethical-spiritual organism evolves. The ideas of Ihering and Laski also can be fully justified as the ethical basis of the state.

Gierke held that the true distinction between law and ethics is the unequal scope of their normative functions. Both are systems of norms. Both presuppose freedom of human will and therefore do not, like the laws of nature, affect the "can" or "must" of man as a creature, but the "may" or "should" of man as a self-determining spiritual being. Both agree also in this, that their norms are not merely counsels for the determination of will, but claim unconditional binding force.

The law does not offer a choice; it makes an unconditional demand. The primary content of the penal law is a prohibition of wrongdoing; the imposition of penalties is only a secondary matter. But it is the same with practical ethics. For an ethical norm to offer a choice between its observance and the suffering of certain consequences of disobedience would be absurd. The idea of Kant, that the ethical code is a categorical imperative, is in essence unassailable. But nevertheless whilst law and ethics, as unconditional norms for the free action of the human will, have much in common, they differ fundamentally in this respect, that the law has as its object external conduct, the ethical law seeks to bring about an inward attitude or disposition.[2]

Law allows, commands, prohibits human action: it is not concerned with the will processes which result in external action. But so soon as an action is done, the law, treating the action as the outcome of human freedom, must enquire into the motives, aims and errors of the formation of the will and pay attention to the thoughts and emotions which shaped that will. But such psychological analysis is only an aid to a proper estimate of the will which has been expressed in word or deed. That is

[1] Gierke. *Recht und Sittlichkeit*, p. 227. [2] Ibid., p. 228.

to say, the approach of law is from the outside. It regulates the external life; the inner life escapes it. But this applies only to the inner life of individuals, and not to that of associations, which are subject to the system of law but only because and so far as it is part of the external life of the individuals and association persons who make up the associations.

The ethical law on the contrary directs itself to motives. It commands moral and forbids immoral action; it applies to human works a standard of good and evil. The ultimate basis of judgment is the motive of which the work is the expression. So its approach is from within to without. The inner life of man is the direct and primary subject-matter of the rules it lays down. This root difference is in Gierke's judgment the cause of the differences, discussed previously,[1] of the forms in which law and ethics manifest themselves. It is why the striving after external power is inherent in the nature of law and alien to that of ethics. And consequently the relation between the collectivity and the individual plays very different roles in both the formation and the application of legal and ethical norms.[2]

Then Gierke turned to a third great sphere of norms, that of morality as distinct from ethics. Morality, according to him, presents itself as a body of norms directed to control to some extent the exercise of the freedom of human will.

In this sense ethics, law and morality are those "normative functions of common life, complementing one another, which earlier times attempted to unite in the conception of 'moral,' so that ethics, jurisprudence and the theory of morality were grouped together as 'moral sciences.'" The rules of morality have this in common with those of law and ethics, that they indicate a "may" and impose a "should" on human will. But they lack the characteristic of being unconditional. Morality resembles law in that it prescribes rules of external conduct, but it

[1] Cf. my *Problem of Federalism*, Vol. II, pp. 1084–1086.
[2] Gierke. *Recht und Sittlichkeit*, p. 229.

is even more external than law, for it does not go beyond external conduct, and does not touch upon the basic inner spiritual processes at all. And therefore it exercises actual power which greatly exceeds that of the law and is often a tyrannical compulsion. But it avoids the appearance of external compulsion. And as soon as the conviction becomes widespread that any different action would conflict with an unconditional demand of the public conscience, morality acquires the strength of law—it becomes moral law. The only thing which distinguishes moral law from mere current practice is the "*opinio necessitatis*" and "*opinio juris.*" Hence the difficulty of demarcation. In contrast with law, morality, lacking the unconditional power of law, must deny to itself any invocation of the organised coercive power of the state in order to enforce its rules. To give a rule resulting from morality any external enforceability is to turn it into a legal norm. But as there are unenforceable legal norms, there is in respect of the distinction between them and mere morality a new difficulty—especially in constitutional and international law—which can again only be got over by the test of inner consciousness. Law and morality are unequal functions of collective life. But the closeness of their contact is shown by the ease with which morality can be transformed into law. But on the other hand something which has ceased to be law can continue as morality.

Morality agrees with ethics in this, that its norms lack necessarily the element of state compulsion. But they are sharply contrasted, in that whilst ethics seeks to determine the inner disposition and judges words and actions by the test of motive morality directly regulates only external conduct. Therefore the powers inherent in them are of different kinds. Ethics will have nothing to do with external compulsion and concerns itself with the inner will: morality does not intervene in man's inner life and make use of external compulsion. Morality, Gierke thought, is not felt by anyone to be a categorical imperative.

But ethics and morality touch one another at many points and supplement each other. This view, however, manifests Gierke's system of *Genossenschaft*, a conception which characterises the whole structure of his theory. He recognised that morality had been of great service to ethics, as had been very clearly shown by Ihering, who had been the first to attempt to make the norms of morality into a coherent system. Gierke thought Ihering had gone too far and had arbitrarily seized on only one part of the formation of morality in making morality valid only as the handmaid of ethics, and seeing its function only as the setting up of a kind of police protection for ethics. Without entering on any discussion of "the untenableness of Ihering's theory of purpose with his purely utilitarian and rationalist explanation of the phenomena of social life"[1] Gierke held that, even if one regards purpose as the determinant of morality, it is impossible to find this purpose solely in its utility to ethics.

For morality may be the result of many impulses which are not ethical; there are a great number of moralities which are matters of indifference ethically, but could not disappear without social life losing much of its attractiveness.

From the difference in the nature of law and ethics it follows that their spheres are distinct but overlap. Law rules alone the sphere of the outward conduct of men, where their inward disposition does not come into consideration; ethics rules alone in the sphere of the inward determination of the will. But there is a wide sphere in which both law and ethics claim to govern human will, because both outward action and inward disposition are concerned. In this sphere the legal and ethical—despite differences of starting-point, mode of operation and object—come together in the result and supplement and strengthen one another. But it may be, and indeed must be, that even where they agree in general, they diverge in many details. And they may even be in direct conflict.

[1] Gierke. *Recht und Sittlichkeit*, pp. 231–232.

So that in this sphere there arises the problem of the division of power.[1]

This demarcation and relationship between law and ethics is really the manifestation of Gierke's system of *Zusammengehörigkeit*. Now he turned to the discussion of the problem of the organic relation between them.

Admitting that the problem of the extent to which there can properly be agreement or disagreement between the legal and ethical norms can be solved only by reference to the current views and requirements of the collectivity, there arises the further question whether a test which shall be always and everywhere valid can be deduced from the idea which is immanent in each of these two life forces and independent of change and circumstance.

Gierke thought the answer must be in the affirmative, if it is recognised that law and ethics are really the expression of definite ideas whose realisation they serve. The determination as to whether that is in fact the case depends on one's conception of the universe, and therefore ultimately on one's metaphysical assumptions. A purely mechanical interpretation of all phenomena, and therefore of human development, does not recognise the existence of creative ideas. Even he who believes in the spirit, but gives its achievements a purely utilitarian the explanation, will indeed recognise the idea of utility as law-giver of human society, but denies the independence of the ethical idea of law, because he regards both the ethical law and the system of law as being only products of the conscious or unconscious striving towards utility. Finally the man who, because of some religious or philosophical conception of the universe, claims for mankind a higher spiritual nature, may see in the ethical idea an original force working itself out through transitory phenomena, but deny that the idea of law is of a like nature. All the holders of an idealistic conception of the universe have been and are agreed in deriving the ethical law from a general human idea. But many of them attribute to the idea of law only a secondary importance.

[1] Gierke. *Recht und Sittlichkeit*, pp. 232–233.

Some regard the system of law as only one province of the realm of ethics and assign to it only the function of an external aid to an ethical purpose. To others the function of the system of law is simply to give a definite form to the economic and social relations which make up its subject-matter, and they judge the value of law by its effectiveness in bringing about a social ideal imposed on it from outside.[1]

But Gierke held that if any ideas at all can be seen operative in the history of mankind, the idea of law must be thought of as an original and unique spiritual emanation of human nature.

The idea immanent in law is that of justice. "But that idea is no more identical with the ethical idea of good than with the religious idea of belief in God, or the idea of truth which dominates science, or the aesthetic idea of beauty, or the political idea of might, or the economic idea of physical need." No one of these ideas is derivable from any one of the others. They all have their common root in the unitary nature of the human soul and are united together by a number of reciprocal relationships. But every one of them is equally original, corresponds to a special property of the soul, and develops itself by virtue of a specific creative impulse, reveals itself as an independent creation and strives towards its own self-appointed goal.

All this applies especially in the relationship of the idea of law to the ethical idea. The impulse of law does not by any means coincide from the outset with the ethical impulse. Gierke thought that the distinction between the consciousness of law and the ethical consciousness could be observed in children even at a very early age. As soon as the child distinguishes between "mine" and "thine" he feels it to be just that he should have his own things and his brothers and sisters theirs. If he divides what he has with them, it is because he thinks it good to do so. In the first case there is the dawning on the child's mind of the legal postulate of

[1] Gierke. *Recht und Sittlichkeit*, pp. 243–244.

suum cuique; in the second that of the ethical idea of love of one's neighbour. That is a picture of the origin of the system of law and of the ethical law in the childhood of mankind. But what was thus born in prehistoric ages has grown and developed in accordance with the law of its inner being, in the light of history, and with the progress of civilisation became ever more clearly understood. Gierke asserted that the whole history of law proves that the progress of law towards completion has been determined by the extent to which it has taken hold of the idea of justice as its guide.[1]

In Gierke's judgment the enduring merit of the theory of the law of nature was that it had expressed so clearly the idea of the independence and uniqueness of the idea of law. It was mistaken in confusing the idea of law with law, and in thinking that it could deduce directly from it a law of reason, valid for all times and people, by which it could test all positive law. The historical positive law demonstrated conclusively that changeability is an essential characteristic of law. Nevertheless Gierke thought that the exaltation of the idea of law above positive law was an enduring achievement of the law of nature, and one which cannot be sacrificed to a barren positivism or mere utilitarianism, if law is to keep its inner power for the fulfilment of its special task.

A change of the forms of manifestation does not prevent the continuance of the idea manifested in those forms. It is the same in the sphere of ethical law; ethical norms are subject to comprehensive change. The ethical standard of a people changes with its advance in civilisation, and may vary between nations which have reached approximately the same standard of civilisation (Gierke instanced divergencies of attitude towards sexual morality and suicide). Christianity brought about great changes in ethical law, but no one denies that the ethical systems embodied in the teaching of Confucius, or Buddha, or the Koran are of a high order. Christian ethics themselves vary within the different churches, and

[1] Gierke. *Recht und Sittlichkeit*, pp. 244–245.

there is to-day a great gulf between the ethical ideal of Christianity and the ethical demands of state and social life. The contrast is sharper even than in the sphere of law. Nevertheless Gierke held that all the historical manifestations of the ethical law are the outcome of a specific idea which was born with mankind and can die only with it.

It is only when we conceive of the development of ethical norms as an elaboration of the immanent ethical idea that we get a standard by which we can judge any particular ethical system.

Similarly the idea of law is a living factor in all actual law, however diversified that law may be. The distinction between justice and injustice is the common possession of mankind, originating in the consciousness of law. And this immanent idea of justice, which develops with the development of law, furnishes us with the test of all operative legal norms.

These considerations provide an answer to the question as to the purpose of law. The system of law cannot possibly be a purpose in itself. It simply joins that hierarchy of purposes in which every self-purpose appears always as a means to a higher purpose. Obviously it is a means to the life purpose of the individuals and the community.

Gierke regarded both individual life and collective life as purposes (ends) in themselves, but thought that at the same time each exists for the other and finds the determination of its purpose in supplementing the other. This is what is meant when it is said that they should serve mankind. That presupposes that there is a goal for humanity, towards which all history trends. What that goal is we do not know; but we must set one before us, if talk about service to mankind is not to be meaningless. And the system of law has to co-operate in the discharge of the tasks set by the higher collective purpose and ultimately by the purpose of mankind. Consequently it must change; it must always be mindful of the service which it owes to the state, to ethics, to economics, to

personal freedom and to all the requirements of progressive moral and material culture, and must always have in mind the question of the appropriateness of its norms to life as a whole. To that extent law is its own purpose; its inner strength depends on its being just. If it is untrue to the idea of justice and concerns itself only with utility, it weakens itself and cannot give the service expected from it. Justice is in itself a good, an inalienable value to mankind. Kant said "if justice perishes, then it is no longer worth while for man to live on earth."[1]

If the idea of justice is the supreme test of the extent to which any legal norm is "rightly" law, it must also be the touchstone by which to judge the appropriateness of the present demarcation between the spheres of law and ethics.

In the preceding argument Gierke claimed to have shown that all reference to the ethical law must be given up when once it is realised to be an alien body within the system of law. Many opinions, widely held but not always clearly formulated, fall into this mistake. It is thought that law recognises its own insufficiency, and calls ethics to its aid. But in so doing it conflicts with its own nature; it tries to treat all relationships of life as merely legal relationships. In order to decide questions which it treats as legal questions it seeks to apply standards which are to be found outside the distinction between justice and injustice in the sphere of ethics to which it has no access. That is, it admits impotence in its own sphere and seeks help from an outside power. But at the same time the intervention of ethics in the sphere of law means a change in that nature of ethics which is opposed to all external action.[2]

Gierke would not admit that present German law took such a mistaken course. He thought that the preceding investigation led to a different conclusion, namely that every provision of law must be considered as a rule of law and only as such, and as having a reason and purpose within the system of law and therefore to be tested by its

[1] Gierke. *Recht und Sittlichkeit*, p. 247. [2] Ibid., pp. 247–248.

harmony with the idea of law. If a law makes reference to an ethical law, it is in fact making the content of an ethical norm into that of a legal norm. There is a sphere in which law and ethics bear rule together. But even here, when their pronouncements as to "may" and "should" are in accord, they are identical only in content, and remain essentially different determinations of will. In making ethical commands and prohibitions its own, the system of law seeks for harmony with the ethical law for the sake of the desired higher purpose. But because it sanctions as law, and endows with the force of law, all that it wills, it ought to take the ethical system into itself only in so far as that system comes within the sphere of the idea of law. It may not require anything ethical because it is ethical, but only because at the same time justice requires it; and it may not forbid anything non-ethical because it is non-ethical but only because it is repugnant to justice. Consequently limits are set to efforts for the harmony of law and the ethical law; when these are transgressed the nature of law and ethics is adversely affected by the intrusion of antagonistic elements and their popular force diminished.[1]

The legal history of all nations shows an antithesis between strict law and "equity," and a conflict between them. But the conflict takes place within the law itself, and is settled by a compromise brought about by the law itself by purely legal means. Gierke was unable to accept the view of Stammler that equity, in contrast with formal law, brings "true (*richtig*)" law into operation, for formal law can also claim to be recognised as "true" law. It is of course possible in considering positive law to regard the one system or the other as "true" law; but the ultimate test can be furnished only by the idea of law. The existence side by side of strict law and equity, each having its own place but the two supplementing one another and working together in harmony, is in accordance with that idea. Justice requires both strict law and equity. In the shaping of the norms and the settling of their

[1] Gierke. *Recht und Sittlichkeit*, p. 248.

relations to one another the question arises how far the rigidity of strict law or on the other hand the flexibility of equity was felt to be just.[1]

Gierke pointed out that his discussion so far offered only a fragmentary contribution to the subject of law and ethics; that he had written from the standpoint of a jurist, took as the starting-point the phenomena of private law, and was concerned only with the actual German law of his own time; but that the question of the relation between law and ethics arises on innumerable points of public law also. And there the position is more involved and obscure.[2]

The conflict of opinion in criminal jurisprudence as to freedom of will, the conception of guilt and purpose of punishment is due to conflicting views of the universe, a conflict which results in diametrically opposed theories as to the nature of law and ethics, and of their relation to one another. The whole structure of penal law, in its principles and detailed application, depends on the choice between these conflicting theories or on a compromise between them. German constitutional and administrative law possessed numerous "institutions" wherein the introduction of ethical ideas into the legal code put great difficulties in the way of the delimitation of the two spheres of law and ethics.

In the sphere of international law also there was, Gierke thought, the utmost confusion. It is true that the existence of international law was recognised on all sides even by those Powers which daily transgressed against it—they all invoked it in order to justify their worst acts of violence. But whilst the content of international law was used as a "mask to serve the ends of *Machtpolitik*," its structure was being shaken to its foundations. He wrote that "whether and in what way it will be possible for posterity to give a new stability to this tottering structure nobody can foretell. And there is still less prospect of success for the attempt, which so far has hardly been undertaken, to elucidate the relation between

[1] Gierke. *Recht und Sittlichkeit*, p. 254. [2] Ibid., pp. 254–255.

real inter-state legal norms and the ethical claims which are so much involved with them." He thought therefore that an enquiry into the relation between law and ethics, based on the firmer and more peaceful if strictly limited ground of existing private law, might lead to more certain conclusions.

He recognised that actually the German system of law had in the service of Germany's war aims undergone a progressive change which had commenced with public law but had spread more and more to private law. Stress must be laid on the fact that the war was for Germany a struggle for power, that the maintenance and increase of the political and economic power of the German nation was the supreme object of the war. Consequently in the transformation of peace law into war law the new rules of law must be framed and applied as "means to power." From this there followed concentration and increase of the power of the state and far-reaching restrictions upon civic freedom. But even so the exceptional law resulting from war needs could only fulfil its task if it remained true to the idea of law. It could be strong only in so far as it had the support of people's sense of law and consequently behind the outward compulsion there was an inward force. And that force Gierke claimed that German war emergency legislation had in the conscious approval of all classes, whatever sacrifices it put upon them. "Self-development," Gierke wrote, "corresponds to the nature of law; as an organic structure it is conditioned in its existence and growth by the life power immanent in it. For that reason its healthy development is conditioned by the maintenance of historical continuity."[1]

All new law comes into existence without diminishing the legacy of the past, if it develops from the old law. But as the law is a spiritual product of community this development must receive its direction and measure from the legal consciousness of the creative community. The legal consciousness of every human community undergoes an historical process which takes place in close connection

[1] Gierke. *Recht und Sittlichkeit*, pp. 258–259.

with changes in the collective common life, with the progress of ethical ideas and customs, and with changes of political social and economic relations and needs, whose inner actuating force is the striving for justice. In respect of law which is to apply to a whole people united into a state, the final decision in every new situation must rest with the nation's collective sense of law.[1]

Gierke realised that it would not be possible to abandon wholly that blending of individual law and social law which had been a consequence of the war. But he urged that it must always be borne in mind that the separation of these two spheres of willing has its basis in the dual nature of man as an individual being and as a member of a species, and is a basic presumption of our whole civilisation, which a one-sided individualism would destroy by dissolution and a one-sided socialism would destroy by stereotyping. Salvation could be found only in a system of law which united individual and social law into an harmonious whole, securing to each the appropriate amount of independence and keeping the two in equilibrium.

Gierke believed that in accordance with the fundamental Germanic conception and the irresistible trend of social and economic development German private law would become more "social" but also regain the independence lost in war time. The Romanic idea of the isolation of the individual would be increasingly replaced by the Germanic legal idea of community. But in every community, whatever its basis, it would safeguard the individual personality and its freedom. It would give to the state, as the chief guardian of the common good, an increased influence in respect of rights of property, freedom of contract, private enterprise and collective undertakings. But he thought that before it abdicated in favour of an omnipotent state socialism the experiences of the war would guard Germany against some of the unsatisfactory reactions of many state-socialist developments which had been necessary in war time.[2]

[1] Gierke. *Recht und Sittlichkeit*, p. 259. [2] Ibid., pp. 260–261.

On the other hand German public law would, he thought, develop on lines of greater freedom. The idea of the legal state, innate in the German sense of law, would reassert itself; and public law would seek to have a more popular basis. To that extent the desire that "our state should become more and more a real democratic state" was justified. But the demand that the hitherto authoritarian state should be replaced by the socialised people's state was based on a misconception. Gierke asserted that "our state has for a long time been in a transitional stage, during which it appears as an institution for the national good, established over and outside of the national collectivity, and in reversion to a basis of existence in the popular association it has become a corporation which lives in its head and members and unites them in a collective personality." But in historical continuity it had taken over as an element in its corporative structure the institutional stamp of "authority" (*Obrigkeit*) which had its independent centre in the strong German monarchy.

Gierke held that Germany in the renewed constitutional state must steadfastly maintain and develop the primitive Germanic conception of the union of monarchy and popular freedom, against the absolutist tendencies which would make the monarchs into the original holders of the state power. The democratic conception of popular sovereignty could not be accepted as a principle always valid, but it was necessary to hold firmly to that conception of state sovereignty, derived from German constitutional jurisprudence, to which the true possessor of supreme authority is the undying personality of the state, but in which in the German monarchy the constitution recognised the princes as hereditary heads of the people and called them as such to be the highest organs of the state in their own right.

The aristocratic elements which had maintained themselves in the organic structure of the national body should not be sacrificed; they must continue to be active in some way, in order to guard against the domination of the

masses, or Caesarism, or frequent change from one to another, and therewith the destruction of freedom.

Gierke's idea of the state is so interwoven with the spirit of nationality that his ideal of a creative state purpose is simply the full development of the national cultural qualities of the state as a whole. That is his spiritual-ethical organism of the state entity.

Looking beyond Germany he hoped for a new structure of international law. However far off the goal of a new general international law might be, the re-establishment of an international community was required by the sense of law of all nations. To that task he believed that Germany could perhaps contribute more than any other nation, because under the domination of the idea of law the German people believed in the sacredness and irrefragability of a law between states "which not only regulates externally the collective life of the nations but also creates an inner bond out of the common idea of law."[1] This is the application of the *Genossenschaftstheorie*, with its harmony of unity and plurality.

As the result of war experience Gierke thought it had been realised that no international law can eradicate the striving for power which is rooted in the nature of the state; that so long as mankind lives in distinct nations having their own purposes, this law between states can never develop into a law over states; and that consequently international law is in harmony with the idea of justice only if it adapts itself to the shiftings of power which are justified by the judgment of history and does not give an equal status to every state, whatever it may be, but gives only to each individual state what is its appropriate due. Gierke warned his readers not to be led by the efforts being made under the guise of pacifism to subordinate states to a majority control, or by talk of the abstract equality of great and small states into the mistaken desire that the international law of the future should guarantee the exercise of powers corresponding to the conditions of Germany's existence as a state, and therewith the union

[1] Gierke. *Recht und Sittlichkeit*, p. 263.

of re-established or new-created states necessary for the safeguarding of those powers. As a nearer goal he pointed to a closer international union between Germany and her allies in the war. But ideas of a Middle European union or super-state must be put aside. Germany must maintain her independence and individuality, and not encroach upon the independence and individuality of any ally; but she must strive to bring about an entirely voluntary co-operation in respect of all things to which common action may be applicable, and—so far as the aid of law is requisite—to express that co-operation in legal rules. Thus the international state as an association of states was Gierke's ideal as the final form of human association.

Owing to his excessive national feeling his ideal of the future international community is far from compatible with the ultimate aim of the *Genossenschaftstheorie*. Hugo Preuss, his theoretical follower, had however already in 1889 overcome this difficulty by his democratic attitude towards the relations of the state to the international community.[1]

Gierke's philosophy of the *Genossenschaftstheorie* is by no means a pragmatic but a rationalistic basis of Neo-Kantian theory of justice. His ethic is simply Kant's ideal of justice as a "categorical imperative," which remains the incontestable core of *Sollen*.

Dürfen, according to him, must not have priority over *Sollen*. The transition from free inner will to external will and action is his interpretation of the transition from ethics to law. Morality or any other social phenomenon is to him merely a utilitarian hypothesis for which he finds no ethical validity, since utilitarianism appears by its nature to be "the product of unconscious and conscious conflicts of utility." No utilitarian conception in ethics or in politics, except the Machiavellian doctrine, can be valid unless it has an ethical basis. But the pragmatic theory, as it has been advocated by William James or H. J. Laski, can adduce a basic theoretical idea of the state. Ihering's theory of *Zweck* is by no means without

[1] Hugo Preuss. *Gemeinde, Staat, Reich*, Berlin, 1889, pp. 118–120.

the ethical claim of social justice on utilitarian grounds. The differences between Gierke's idealistic and the utilitarian conception are nothing more than the distinction between the philosophical basis of social *a posteriori* facts and that of the *a priori* categorical imperative. Although Gierke rejects scientific formalism and denounces purely logical hypotheses on the ground that they have not the inner force of reality, yet he attempted to find a theoretical justification of the ethical validity of collectivity and plurality by making use of Stammler's scientific method in the transformation from internal to external will by the ethical-spiritual organism of unity in plurality.[1]

But since no theory is entirely independent of others, the main problem of criticism is how much any two ideas have in common and how much and in what way they differ.

In this respect it is quite certain that Gierke could not entirely agree with the Kantian *a priorism*, in that he believed in the *Genossenschaft* method of human association as the product of an historical process and of the creative synthesis and co-ordination of plurality and unity which is immanent in social and individual existence. Gierke, in this respect, absolutely rejected Stammler's conception of the incorporation of all the elements of the human will into a single will to justice. But as the Neo-Kantian scientific formula, in the approach to the idealist whole, was so influential in his time as the highest speculation of legal philosophy, he utilised it to a certain extent in order to justify his organic theory of ethics against Ihering's theory of purpose.

In this respect, no matter whether or not we agree with Gierke's theory of will in its relation to his organic conception of human association, his philosophical doctrine, as he is the advocate of the theory of will, cannot entirely be dissociated from the Neo-Kantian scientific method, which is, I think, far better than the application of the Hegelian dialectic logic to the synthesis of plurality and unity.

[1] See my *Problem of Federalism*, II, Conclusion, p. 1086.

Gierke's assertion that the law, as the external relation of human will and action, is a necessary stage towards the ethical justice of the inward will and action means that these two things—law and ethical justice—are distinct from, but co-ordinated with, one another as the ideal foundation of the spiritual ethical organism. It illustrates again "the reciprocal importance of unity and plurality in the association system, as giving concrete value to the individuality by the recognition of collective personality."

His solution, therefore, is the complete orientation of the philosophy of law towards the philosophy of history and of the law towards historical culture.

Therefore I am in entire agreement with the criticism of Gurwitsch on this point; "for to postulate law as the necessary means of making possible the realisation of the ethical ideal assumes of necessity the doctrine of the realisation of ethics in the historical civilisation by means of the empirical society whose inalterable basis is law. The recognition of the independent ethical importance of the collectivity leads with logical necessity to a philosophy of history and of civilisation and thence to a philosophy of the unconditional pre-requisite of all true collective life." So, Gurwitsch adds, "the conception of historical civilisation as a medium of realisation leads directly from the theory of moral ideal to the philosophy of law."[1]

Therefore the test of the harmonious agreement between unity and plurality is the spiritual-ethical organism which is based on the philosophy of history and of law as a medium of realisation. Accepting the validity of Gierke's method, which may be designated the utilitarian rationalism of the harmonious and creative readjustment of plurality and unity, his attitude towards ethics is nothing more than that general justification of ethical validity which all pluralists uphold, but endowed with some purely German characteristics.

[1] Gurwitsch. *Otto von Gierke als Rechtsphilosoph. Logos,* Bd. XI, 1922. Heft I, pp. 112–113.

CHAPTER IV

THE PLACE OF THE STATE IN THE *GENOSSENSCHAFTSTHEORIE*

§ 1

THE kernel of the *Genossenschaftstheorie*, as Gierke remarked, was formed by the "conception of the corporation as a real collective person in opposition to the phantom of the *persona ficta*"[1] and his whole life was devoted to "the attempt at a completely new reconstruction of the general theory of the legal nature of human association." In this effort to set up a theory of personality derived from the organic-historical idea of law the two chief enemies against which Gierke fought vigorously were the "positivist formalism" and the "abstract natural-right theory of individualism" in legal science.[2]

The phenomena of juristic individualism were widespread in every epoch of the history of thought from the broad foundations of Roman law down to the modern natural-right theory, and at the same time rationalist formalism was the basic conception in legal and constitutional theories from the Sophists to Kant and again elaborated in the modern Neo-Kantian philosophy of law. Juristic positivism, however, was a recent development of jurisprudence; it was formulated as the principle of constitutional law firstly by Gerber and Laband, and developed into the dominant doctrine of jurisprudence in the second half of the nineteenth century by forming the generalisation of positive law as the highest criterion, entirely destroying any philosophical background.

On the other hand Gierke's system was the outcome of a conception of legal philosophy derived from a wealth of positive and historical materials which gave it a

[1] Gierke. *Die Genossenschaftstheorie und die deutsche Rechtssprechung*, Berlin, 1887, p. 5.

[2] Id. *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie*. Breslau, 1880, p. 317.

legitimate authority. But the orientation of "the transcendental, *a priori* basis of law" causes philosophy and history to be interwoven in the fabric of Gierke's legal construction.

Gierke, more than any of his contemporaries, appreciated the importance of the application to law of the historical method but declared that the "addition of a philosophical theory as to the nature, basis and purposes" of law was absolutely necessary.[1]

In his *Grundbegriffe des Staatsrechts*, published in 1874, Gierke pointed out that the progress of any science depends on the extent to which it gains in both clarity and depth of fundamental principles. The ideal is simultaneous and co-equal advance in both respects, but this is of rare occurrence; the tendency is always, with individual thinkers or with a stream of intellectual activity, to concentrate on one to the inevitable disadvantage of the other, and this one-sidedness he believed to be the main cause of conflict in many branches of science.[2]

The goal of every science is absolute clearness of principles, but the direction of effort towards clearness alone generally results in a one-sided formalism. No man attains to a precise conception of the ultimate nature of things; their form alone is clearly manifest. But form is merely external, and the effort soon proves that clearness is often only superficiality. This is the inherent danger of formalistic jurisprudence. The danger of the other course —the direction of effort towards depth—is that the resultant ideas are often shapeless, confused, obscure. Both courses, wisely pursued, help the progress of science; but there is a danger that their representatives will forget that they have a common goal, and waste in conflicts between themselves powers and energies which could be better employed in the service of a common cause. And Gierke thought that at the time at which he wrote this danger was fully as great in jurisprudence as in other sciences. He remarked that the difference and conflict

[1] Gierke. *Die historische Rechtsschule und die Germanisten.* Berlin, 1903, p. 34.
[2] Id. *Die Grundbegriffe des Staatsrechts.* Tübingen, 1915, p. 1.

between the two schools, which he called the "formalist" and "pragmatist" schools, seemed to have taken the place of the proverbial but now almost ended conflict between the philosophical and historical schools.[1] The formalist movement had brought a very distinct advance in jurisprudence. A consequence of its relation to actual life is that no other science is so driven to the need for the clear and intelligible formulation of principles, and so naturally the juristic mind comes to be characterised by a logical formalism. But the admitted advantages of this are offset by the consequences of its one-sidedness. Importance is attached only to the logical completeness of ideas; their content is ignored. The main task is thought to be the co-ordination of the whole positive subject-matter of law with the theories which have already been formulated, and to interpret juristically, with the help of certain traditional categories which have become established in the course of centuries, the daily increasing host of living legal creations. This procedure ignores the fact that the general ideas so used, however widespread and familiar, are merely conclusions drawn from certain temporary conditions and by their very nature cannot be eternal and immutable. Failure to recognise this has meant that many systems of jurisprudence, general or special, though skilfully devised have no basis other than some arbitrary definitions and dogmas derived *a priori* from the "principles."[2]

As against this one-sidedness Gierke said that jurisprudence had for some time past shown a more pragmatical disposition, by striving to take account of the inner and vital content of law and assert its nature as an historical manifestation of the common spirit of humanity.[3] This school of thought holds strongly that jurisprudence is not the same thing as law, but assumes and has to do with law as an entity—that is to say, jurisprudence has not to order life in accordance with abstract ideas, but to derive the abstract ideas from the

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 5.
[2] Ibid., p. 6. [3] Ibid., p. 7.

facts of life. It is therefore convinced that all legal ideas have been determined by historical conditions, and that juristic dogmas have only a relative validity. The spirit of man, incapable of comprehending the absolute nature of things, makes surest advance towards an unattainable goal when it learns to subject itself to limitations. The man who abandons the restrictions of traditional formulas without having anything to replace them, may find his ideas in chaos; definite ideas may be replaced by vague impressions. Frequently the contemplation of the mass of the positive facts of life paralyses the power of abstract thought; instead of an adequate notional word, one has recourse to a figurative metaphorical phrase to express disordered thought.[1] This has the risk that more is said than is meant, scope is given for the most diverse interpretations, and currency is given to bewildering phrases to which no precise meaning can be attached. Starting with the well-founded belief that a particular traditional formula has become too restricted to contain the new legal creations that are forced into it, the adherents are apt prematurely and carelessly to throw away one "scheme" before securing another to take its place. Whilst they accuse their opponents of "scholasticism" and "dogmatism," they are themselves accused of adopting a "non-juristic," "uncritical," "unsystematic" procedure. And in striving for a more profoundly philosophical basis of law, this school keeps itself free from the one-sided use of formal logic and finds its basic principles in metaphysics, and is thereby caught in the whirlpool of controversy and forced to take a definite attitude towards the questions of free will, or the teleological or mechanical conception of the universe, of monism, dualism and atomism.[2] And thereby it reveals the uncertainty of the basis of all human knowledge, whilst the formalist school conceals this by a dogma apparently free from all presuppositions. So the pragmatic school adopts an historical basis, but one quite

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 10.
[2] Ibid., pp. 11–12.

different from that taken by its opponent, inasmuch as it regards present law as a stage in development and does not recognise any "eternal verities" in the principles and rules of law prevailing at the time, any more than in the different principles and rules of a different epoch. This attitude has had most valuable results in respect of the history of law; but in respect of the scientific presentation of contemporary law its results, Gierke thought, had often been only negative.[1] It is easier to destroy ideas and forms which are recognised as out of date, "un-German," shallow, than to give expression in a new, national and more profound system of ideas to the still indefinite and disputed content of contemporary legal consciousness.

Gierke thought that great as was the credit due to the pragmatist school for showing the close relationship of law to the national culture as a whole, it had not entirely avoided one-sided exaggeration. It had frequently lost sight of the fact that, despite the close interaction between law and the other activities of national life, law constitutes an independent sphere of human activity, with its own particular content and purpose; and that although it *should* be in harmony on the one hand with morality and on the other hand with economic conditions, yet it retains its own independence by the fact that it can conflict with both.[2] Thus some introduced moral considerations into the field of jurisprudence and thereby obliterated the boundary between law and morality, to the injury of both; others applied to jurisprudence conceptions which are purely economic, the direct application of which causes confusion and disaster by sweeping away the necessary distinctions between the various subject matters of law.

So Gierke argued that in jurisprudence either line of thought, if pursued alone, led to serious error, and that this risk was greatest in respect of public law.[3] In many parts of that field the treatment had long been merely pragmatical—there was no recognised formally juristic

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 12.
[2] Ibid., pp. 12–13. [3] Ibid., p. 14.

system applied to them; the reaction against the consequent chaos of ideas resulted in attempts at a formulation which was, for that reason, so much the more abstract, arbitrary and subjective. This was particularly so with constitutional law, as to which any recognised method of juristic treatment was entirely lacking. Until recently the pragmatic treatment of it had predominated. The science of constitutional law had hardly freed itself from the general philosophy of the state on the one hand and from the history of the state on the other; hardly any attempt had been made to create out of the abundant material a unified and independent body of legal principles. There was much philosophical discussion of the basis, nature and purpose of the state, but the precise juristic formulation of principles was neglected. The relations resulting from public law were set out clearly enough; but their legal analysis was ignored. Consequently recent efforts to clarify constitutional law by formalising it were welcomed, because of the promise they held out of bringing that law back to plain fundamental principles of a purely legal nature and fitting it into the general body of law. The task was a proper one, but in Gierke's opinion it had not so far been achieved; it had hardly been begun.

This uncertainty and want of unity in the juristic treatment of constitutional law, the indefiniteness and incompleteness of the pragmatic doctrine and the scantiness of the positive results of the formalist reaction, showed themselves most in the conflict as to the very idea of the state. That involves questions the answers to which are an essential preliminary to the formulation of any system of constitutional law. Is the state, in public law, "subject" or only "object"? If it is subject is it sole subject, or have its members over against it their own subjectivity in respect of constitutional law? What is to be the legal conception of its personality, if it has one? Is it to be juristically regarded merely as an external attribute, or also as an internal attribute?

Apart from the positivist formalism the state is not the

child of law, as the doctrine of natural law believed, and law is not a creation of the state, as supposed by most moderns. Rather, "state and law are both original products of that community life which is essential to mankind, and must be treated to-day as co-equals," but as throughout their whole development they are dependent upon each other any weakness of either is offset by the strength of the other.

But the position in respect of the moral law is different. Moral laws claim complete validity, but compulsory enforcement conflicts with their essential character. They operate only by the force of their own inherent strength and attain their object only if, and so far as, they are accepted voluntarily by mankind. External compulsion is not rejected by them, but should be only an aid, and should serve to develop ethical personality only by helping the growth of good and the choking of evil seeds. Thus the realm of morals is ever freer and more independent of the state than is the realm of law. But it must not be supposed that the state, which possesses supreme power, has not a far-reaching moral task; the modern state is not merely a legal state (*Rechtsstaat*), it is also a culture state (*Kulturstaat*) and as such must use its power to promote morality and repress immorality.

This synthesis of law and morals and law and state was the fundamental basis of Gierke's theory, according to which, in his philosophy of law, legal consciousness must necessarily be based on the fusion of ethical and organic conceptions.

Though Gierke disagreed with the natural right theory, he recognised that the idea of law owed to it very much which had not been abandoned but generalised by the historical conception. "The idea of justice which was fought for in the conception of natural law will maintain its independence also in the conception of positive law, both against the idea of social utility and against the idea of collective power."[1]

[1] Gierke. *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie*, p. 318.

Gierke insisted that in order to demonstrate the foundation which had been laid by modern science and must be the unconditional basis of all future development of constitutional law, it must always be borne in mind that in our day the task which devolves upon life and science is to find a way to combine two entirely antagonistic basic conceptions of the state into a higher unity.

Of these conceptions one, proceeding from the assumption that the generality is the sole reality, finally attains to the negation of the factor of law in constitutional law, and the other, postulating the exclusive reality of the individual, arrives at the destruction of the idea of the state.[1]

It is in the attitude taken up by Gierke towards both these extremes that he was in accord with modern pluralists.

According to him the first of these two doctrines dominated the ancient world, and the revival of ancient ideas had brought its revival in philosophy, jurisprudence and politics. The main axiom that "man exists for the state" was the origin of all those doctrines which were only variants of Aristotle's fundamental thesis that the whole precedes the parts.

Gierke disagreed with these conceptions of the absorption of the parts in the whole because "there can never be reciprocity of will relationships between a simple unitary personality and its non-independent members, and between a causal whole and its created parts."[2]

The contrary or individualistic tendency had prevailed in the German mediaeval and natural-right schools of thought and owed to the latter its far-reaching permeation of philosophy, jurisprudence and politics. Its principle is that the state exists for man, that the individual has its own reality, is itself purpose, and is a natural unity. At the same time, Gierke asserted, in the individualistic view the state is only one means of promoting with greater

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 88.
[2] Ibid., pp. 88–89.

strength and success the collective but also, and no less, the individual interests of all or of a number of individuals.

According to this school the state as such is not a person, but "a sum of unequal individuals, some ruling and some ruled." Some members of the school wholly denied the personality of the state, whilst others for reasons of external convenience attributed to the state the quality of a unitary subject of law, but this meant not that the state is the expression of a special general entity but that it is a fiction formulated for purely technical and formal purposes. The result in both cases was the scientific postulate of the absolute state.[1]

Gierke admitted, however, that neither of these opposed doctrines was any longer held in its original strictness. The absolutist doctrine had been modified in favour of individual rights; the individualist doctrine, whilst it had often led to the most pronounced materialism and atomism, had also undergone in many respects a change in favour of the justification of the state as a whole.[2]

So Gierke could say that "the greatest achievement of modern German legal science of the state is the attainment of a new fundamental principle of such a kind as to be the kernel of modern state life in contrast to that of both antiquity and of the Middle Ages." It started from the historical fact that man has everywhere and at all times a dual nature—he is for himself an individual and for his species a member. Neither of these qualities has by itself made man what he is; neither the separateness of the individual nor its membership of the generality can be dismissed without denying the nature of man. So Gierke assumed that man cannot exist as a self-conscious being without realising himself to be at once a particularity and a part of a generality; his will receives its content and impulse only in part from himself, in part it is determined by other wills.

Gierke believed that so far as any purpose is to be attributed to existence, the individual human life is neither a mere self-purpose nor a mere means to the

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, pp. 90–91. [2] Ibid., p. 92.

development of the species, but the individuality and generality exist at one and the same time for themselves and equally for one another, and that the task of mankind is the establishment of harmony between them.[1] On this principle the human individual and the human collectivity have each a complete reality and a unitary being, i.e. the characteristic nature of an organism.

Among these organic human associations, the foremost place is taken by the state. The characteristic of the "state" association is that its subject-matter is the "enforcement of the general will." Gierke said that such a union constitutes "a collectivity of political action. Its substance is the general will; its outward form is that of organised power, its task is purposeful action." A collective life of a state kind existed long before the state, as a unique and special organism of state life, came into being. The isolated family, wandering tribes and hordes indeed exercise state functions, but the state has not yet become an independent entity. When that stage is reached, the state functions can be discharged by a number of unions, narrow and wide, and by an ascending series of political communes, corporations and unions.

The qualitative differences between the "union of power" and all other political unions are due to the fact that the former is not restricted by any superior power and is itself superior to every other like power. For, as Gierke remarked, the supreme power is differentiated from every other power by the fact that it is wholly and completely power; and the will which corresponds to that power is different from every other will in being sovereign, more general and wholly self-determined. Consequently, although political unions have all a state nature, the term "state" is applied only to the one which is at any given time supreme.[2]

Therefore, according to Gierke, the state is the "realisation of a definite and essential part of the collective life of man"; it is not a voluntary creation of individuals but the necessary product of social forces active within

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 93. [2] Ibid., pp. 96–97.

individuals. It developed originally without the co-operation of a consciously creative will; it was the natural product of an unconscious urge to society; later it was deliberately shaped and could even be created by a deliberate act of will, but even then it is not a union of individual wills but the creative act of a general will.

Gierke asserted that from this it follows that we must attribute to the state an actual existence of its own. The state appears to us "as a human society-organism, with a unitary common life distinct from that of its members"; it is constituted as a society-organism of many society-organisms some of which are simple and others complex (i.e. themselves made up of society-organisms); its life is manifested in the life activity of its members and organs which at the same time have an existence of their own. But despite this the state is a "real unity" because all particular existences, in so far as they are elements of the state, are grouped, connected and combined according to the idea of the state whole, and find the content of their existence not in themselves but in their relation to the higher common life. The unity of the state can be denied —because of its consolidated nature—only in the same spirit and sense in which one could regard only atoms as unities and the world as merely a multiple sum of such unities.[1] So Gierke contended that the state must be recognised as having *vis-à-vis* individuals an original entity, existing for itself and having its own purposes. The individual belongs to the state as a member only with a part of its existence; the remainder of its being is entirely untouched by the collective life.

To sum up, the state is collectivity, but it is not the human collectivity and nothing more. It is only one among human social organisms, and only a particular part of the life of the human species forms its conceptional content. It is of course always possible that with a particular people or at a particular time the state may take upon itself all or very many of the functions of collective life; but in all highly developed civilisations,

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 98.

and especially in the modern world, the non-political parts of human social life find expression in special entities having an existence of their own. Physical community of race, language and territory is indeed of the essence of the state to some extent, but theoretically can exist as well without as with the state. Even if the state approximates to its ideal of being the political organ of a single and unitary people the natural and political conception of the nation will never wholly coincide. And the life unity of the nation is the centre of political and of all other collectivity. But it is not the sole natural centre; within the nation, the race, the commune and the family, and outside the nation the community of civilised nations and, finally, mankind exist as narrower or wider human social entities with their own spheres of life. Similarly the ethical-social, religious, literary and economic collective activities of the community have their own special organisms, with their own distinctive lives. But whilst in view of this the state must give up its claim to be the complete human generality, it is that generality for those collective relations for whose realisation it exists. And in respect of collective power relations, all other union entities, although they are collective entities with powers for their respective spheres, are yet in relation to the state only separate entities whose political power is ultimately embodied in and subject to the state powers. And consequently Gierke asserted that in fact the political life element of all other collective and individual existences finds its last purpose and definite limitation in the state, which as the sovereign organism of social power is the only organism which has no superior collectivity limiting its power and as a political entity is not at the same time a part of another political entity.[1]

This line of criticism indicates Gierke's whole theoretical structure. The federative relationship of powers between the individuality and generality in the state is the common method of approach to the whole system of the *Genossenschaftstheorie*. The relation between

[1] Gierke. *Die Grundbegriffe des Staatsrechts*, p. 101.

private and public law, between ethics and law, and between plurality and unity is derived from this conception of the *Zusammengehörigkeit* of the whole and the parts, which in its turn is based on the theory of organism.[1]

Side by side with this advocacy of the organic conception of the state structure Gierke vigorously fought against the formalist positivism of jurisprudence as being entirely devoid of history and philosophy. He remarked that "the 'juristic method,' in so far as it seeks to fulfil the highest tasks of legal science, should make use of both the historical and the philosophical method of approach." Hitherto it has "on the one hand exaggerated the ability of speculation and on the other hand confused philosophical generalisations with actualities."

He added that "a scientific juristic theory of state law without a philosophical basis must always be unthinkable." *Allgemeine Staatsrecht* is not by mere chance a child of Greek philosophy. "The general theory of state law must of necessity bring its own considerations into relation with those metaphysical and ethical problems which are involved in the problem of the basis, nature and purposes of the state and law."[2] As philosophy cannot be replaced by "formal methodology," so the positivist formalism cannot give any adequate consideration to the principle of law without the aid of a philosophical conception as to the source of law.

At the same time Gierke objected to the mechanical-atomistic individualism of the natural right theory, which is "the complete abstraction of all differences between the parts and the absorption of them into colourless groups."

The starting-point of Gierke's *Genossenschaftstheorie* is the postulate that "a merely abstract union of individuals does not exist." For him the merely formal union of individuals by a legislative contractual act does not produce a community.

[1] Cf. my *Problem of Federalism*, II, pp. 663–676, 1088–1090.
[2] Gierke. *Laband's Staatsrecht*, p. 23.

The community, as a reality, i.e. as a "self-based" unity, is defined by Gierke as a spiritual and ethical organic whole.[1]

Since the organic whole, or organism, is the collectivity as "actual unity," the meaning of organism, differing from a merely atomistic representative body of unity, is concerned with the species, and not only with a general validity but with the positive unity of a collective validity.

The organism is the conceptional expression of the community as a concrete ethical value-entity; it has consequently, as Gierke himself often pointed out, nothing to do with the natural science definition of organism and can be described as an ethical moral organism.

The justification of the concrete totality-value of the community, *vis-à-vis* the individual, as having ethical validity is the basic conception of Gierke's idea of organism, which is not entirely analogous to that of natural science.

His famous sentence: "Without you there is no I, without I there is no you; and man owes what he is to the association of man with man" is the keynote of his whole doctrine.

This leads directly to his logical elaboration of the *Genossenschaft* idea into the real foundation-stone and basis of his whole scientific structure, that is the "harmonious union of unity and plurality in the collectivity"; in other words the relation of unity and plurality is "in no respect one of antagonism but one of interdependence."

Gierke therefore asserted that unity and plurality exist for one another and in their reciprocal conditioning of one another are each at the same time aim and means,[2] and the final test by which we determine the ethical justification of collective and individual purposes is the extent of the harmonious agreement between them.[3]

[1] Gierke. *Recht und Sittlichkeit*, p. 219. *Das Wesen der menschlichen Verbände*, pp. 10–12. *Die Grundbegriffe des Staatsrechts*, pp. 80–85, 96.

[2] Gierke. *Das deutsche Genossenschaftsrecht*, II, p. 906.

[3] Ibid., IV, p. 42.

What then is the *Genossenschaftstheorie*?

The old German *Genossenschaft* conception gradually developed into the corporation conception, the change taking place first in the towns.[1] The theory of *persona ficta* was introduced into jurisprudence by Pope Innocent IV, and the conception of sovereignty emerged from Bartolus' notion of superiority and became a concrete dogma of Jean Bodin on the natural law basis. The conception of corporation took a purely institutional colouring.[2] The modern human organisation, according to Gierke, is something of a "compromise" between the conception of corporation and that of institution.

The central point of this theory is the conception of personality, which is different from the "phantom" of the fictitious and artificial person of sovereignty or the "abstract juristic person" of Laband. The complete reality of the association personality is based on the super-personal conception of the association unity as a whole; as Gierke said, "human associations are really existing beings and therefore real persons in the sight of the law."[3] And he held that all modern theories are directly indebted to the *Genossenschaftstheorie* for having created something to replace the fictitious personality.

The objection to the juxtaposition of the artificial and natural individuals brought about the substitution of the "coalescence of collective and member existences" as the criterion of the law of corporations and led to a new theory of their creation and termination. It led to a revision of the established dicta as to the scope of the corporation legal capacity, and to the affirmation of the possession by the collectivities of capacity for will and action. From this there followed a comprehensive re-interpretation from the juristic standpoint of "all corporation life relations and processes," and there was a complete change in ideas as to the relations between

[1] Gierke. *Über die Geschichte der Majoritätsprincips.* In *Schmoller's Jahrbuch,* 39. Jahrgang, Zweites Heft. Munich und Leipzig, 1915, p. 15.

[2] Ibid., p. 21. *Das deutsche Genossenschaftsrecht,* IV, pp. 279, 286, 287.

[3] Gierke. *Privatrecht,* I, p. 406.

narrower and wider unions and particularly between the corporation and the state. Thus, Gierke said, there opened out an "immeasurable vista." For the *Genossenschaftsrecht* not only undertook the task of laying down the basic relations on which the legal system of collective life should be built up until it culminated in the state, but it expanded into a social law with constitutional law as its summit.

As regards individual law and corporation law it was difficult for the *Genossenschaftstheorie* to find a sure line of demarcation, and it did so only when it expanded into a theory of the collectivity and society. The foundation-stone of that indispensable complement of the *Genossenschaftstheorie* was furnished by Germanic law, particularly in the conception of the *gesammte Hand*.

The *Genossenschaftstheorie* gave full recognition to the fact that corporations are not an exhaustive category of the social structures which can be developed as real union personalities out of individual law. It made it applicable to institutions, in the main in accordance with the traditional view, and delayed the establishment of a general conception which should make the personality of the institutions intelligible without invoking the aid of the legal fiction.[1] In this respect, Gierke asserted, the *Genossenschaftstheorie* needed to be supplemented by the institutional theory; the institutions must be placed alongside the corporations as a second main genus of social union-entities. Historically and theoretically the institutional entities must be regarded as independent beings, and as actual possessors of will and capable of legal subjectivity. The institutions therefore present themselves as organised human unions, with a unitary union-will, and therefore as creatures to which a true legal personality can be attributed.

Gierke began his discussion of the *Genossenschaftstheorie* by pointing out that one of the chief points in the discussions which that theory provoked was the question as to the necessity of state participation in the coming into being of a juristic person. The *Genossenschaftstheorie*

[1] Gierke. *Die Genossenschaftstheorie*, p. 11.

was theoretically in conflict with the teaching of the Romanist doctrine of corporation, namely that the personality of a union could result only from a "creative act of state will," but at the same time it honoured the practical tendency of the Romanist doctrine to attribute in fact personality to all appropriate unions and to strive for freedom in the formation of corporations as a corollary of freedom of association. And the supporters of the *Genossenschaftstheorie* did not deny that a *juristic* person as such can exist only by reason of positive law. They admitted that the state, because it is sovereign in the field of law, has formally the power to shape as it pleases the rules of law as to the attainment of legal personality.

Gierke stressed the necessity for distinguishing between the part which in the coming into being of a juristic person can and should be played by the law, and consequently by the state as an organ of law, and by the state as a living entity possessed of power. The law alone can decide whether anything, however formed, has or has not the quality of legal subjectivity. If therefore the state attributes legal subjectivity to anything, it does not thereby directly create a subject of law; it only makes or confirms a rule of law which sanctions the existence of a legal subject. It was certain, Gierke said, that in Germany, in the grant of corporation rights, the state, so far as it created a legal subject, did so only as the organ of law. But whilst the law can create this quality of legal subjectivity, it cannot create the underlying basis of that quality, i.e. being the content of the norms governing the sphere of free will it cannot create either the possessors or the subject-matter of the will-powers to which its norms relate.

The creative force does not lie in what is willed by the law, but in the living energy and free self-determination of the wills.

So Gierke asserts that the foundation of a state or a church can be regarded, exactly like the setting up of a union or an institution, as an action of a definitely juristic character which can be carried through at each individual stage in accordance with legal rules. In all these cases

the creative power which calls a "new being" into existence arises not from the law but from the historical or social facts. "Its inner kernel is the creation of life relationships by the power of will protected and limited by law."

Consequently the creation of every juristic person involves a constituent act essentially different from the mere announcement of its personality. The nature of that act is the introduction of a possessor of will-power wholly distinct from the individuals, and the possibility of such a creation is founded on the social basis of mankind.[1]

In the consideration of the process of will for the creation of unions or corporations on the basis of the *Genossenschaftstheorie* the existence of unions or corporations is not entirely recognised to be the result of legal subjectivity created only by law.

Gierke pointed out that in modern times union-entities come into existence chiefly by the action of conscious will and present two distinct types, those of the *Genossenschaft* and of the "institution."[2]

The first arises when a plurality of wills creates out of itself a unitary will; the individual wills amalgamate, in respect of that part of themselves which they surrender to the union, into a new will-unity. The institutional formation is of the opposite kind; the unitary will transfers part of itself to a plurality which is united by that action. The result of the former is normally a corporation and of the latter an institution, though sometimes an institution may be constituted by the former process and a corporation by the latter. In the constituent acts, which can take very diverse forms, the part of the state is altogether different from that which it plays in deciding as to the granting or withholding of legal subjectivity. For as the state is itself a "real power of will," it can intervene directly in the process of the formation of the social will. In the first place it can by its own creative act call institutions and corporations into existence. The setting up of corporations by the state does not exclude the

[1] Gierke. *Die Genossenschaftstheorie*, p. 24. [2] Ibid., p. 25.

co-operation of the members thereof; that is indeed necessary in many ways in the setting up by administrative act, in that the law may make the act of the administration dependent sometimes upon the parties to the intended corporation being first heard, and sometimes upon the concurrence of the majority or all of them.[1] It is even conceivable that the state might allow to all other possessors of public or private will-power such a measure of co-operation, and no more, reserving to itself a monopoly of the creation of union-entities. Gierke remarked that the German state had never done this, but had always recognised the capacity of the will-powers subordinated to itself to form out of itself new will-unities by means of union or of institution. But since the state is the possessor of the highest will-power it does not put itself on a level with such a social will-formation, but "keeps it largely dependent upon its own will."

Then the question is how far the need for the state consent to the formation of the union affects the nature of a juristic person. Formerly the creation of any form of union needed the express sanction of the state, but with the general recognition of freedom of association the need for such sanction tends to be limited to those unions which are of importance in public law.

Where the state allows freedom of association it can not only impose limitations thereon by prohibiting some kinds of unions, but it can also affect the form of the union structure by regulations of many kinds. Even when it leaves the formation of a union to the participants it can indirectly compel that formation by making membership an obligation. It can promote the creation of particular kinds of unions by the offer of special privileges and rights. Even if it does not impose the need for express consent it can prescribe in general the observance of certain material and formal conditions such as standard rules and public registration. The very existence of the union, or its particular legal status, can be made dependent on the observance of such regulations. It is even possible

[1] Gierke. *Die Genossenschaftstheorie*, p. 27.

for the recognition of the union as a legal subject to be bound up with the fulfilment of the relevant conditions and to take place at the moment when that fulfilment is formally confirmed. But this shows clearly that the juristic personality as such does not spring from the will activity of the state in the setting up of the possessor of that personality—nobody supposes that official registration is the same thing as the state creation of a person.

Proceeding to discuss the problem of the precise legal significance of the processes which accompany the rise of a juristic person, Gierke pointed out that in the Germany of his time the rule of law on which juristic personality was based was a *general* rule of the law or of customary law. It therefore unquestionably in most cases precedes the formation of a new union, which therefore enters at once into a position prepared for it by the system of law. Consequently the actions of the state authorities in certifying that the legal conditions are fulfilled are only declaratory and not creative.

There was, however, some doubt as to the case in which juristic personality is granted by a special decree or similar act of state—in such a case was the juristic personality of the union based on a general rule of law applied by the decree to a particular case or did the state thereby create for the particular case a special rule? Gierke said that for a long time the prevailing opinion had been that this was a case of a *lex specialis*, but that view was now regarded as untenable. It was, in fact, only applicable when there was no general freedom of association. Consequently the present-day system of law regards the processes which result in the formation of a juristic personality as the birth-process of a legal subject acknowledged by it. It must therefore subordinate them to the point of view of social law. Gierke thought that immediately that happened the difficulties which seem to arise from the absence of a juristic person disappear. For if the law recognises a juristic person which does not yet exist but is coming into being, it is obvious that this position—which can be compared with that of the human embryo—can have

legal consequences. On the one side the non-existence of a legal subject is an obstacle to the setting up of legal relations, which remain uncertain for the legal subject which is in process of formation until a decision is reached as to its being or non-being; and on the other side the juristic person in process of formation can rank as the governing centre of the corresponding legal processes and relations.[1]

This removes all the practical difficulties as to the legal judgment of the very diverse and often very complicated facts which create the social entity which receives legal personality.

There is the external problem as to when the birth of the new legal subject is *juristically* complete. Modern legislation has generally placed this at the time when the union as such comes into being, that is, at the moment when the legal requirements are fulfilled.

Internally, as regards the *genossenschaftlich* mode of formation, this takes place regularly with the aid of a series of declarations of will, which have the legal nature of contract and to that extent are governed by the ordinary rules of the law of contract. Persons hitherto unassociated bind themselves to become members of a corporation which is to be formed—there is agreement as to their individual rights, there are on the one side the whole body of future members and on the other the promoter or promoters. It is even possible for there to be a formal syndicate (*Societät*), which brings together the forces and resources of the participants and then is absorbed into the new corporation. But the contractual bringing together of such forces and resources for such a purpose is in no sense a preliminary contract.[2]

He went farther, saying that all contracts which make the basis on which a corporation is set up are only on one side of their nature related to the general law of contract; they are at the same time elements of a creative act which calls into being the possessor of a social will. The very

[1] Gierke. *Die Genossenschaftstheorie*, pp. 120–121.

[2] Ibid., pp. 130–131.

actions by which the individuals surrender a part of their freedom complete forthwith the setting up of the collectivity of which they declare themselves to be members.[1] The complex of preliminary contracts has then in a way a double aspect; looked at from the one side it appears that contract brings about the plurality as a legal creation between free individual persons on the one hand and the unitary exercise of the constructive collectivity on the other. This act of formation, Gierke argued, is not a contract but a unilateral collective action to which there is no parallel in individual law.[2] It is the self-affirmative act of the developing will of the collectivity which is coming into being; and therefore the whole formation of the corporation from its first inception to its final completion must be regarded as a unitary act; the numerous individual actions which take place are merely included as subsidiary factors in a collective action motivated from one centre and directed to one purpose. The formation is then from the first a corporate action; the collectivity which is in process of combining must appear as a unity in order to establish itself as a unity. The necessary powers and means can be obtained by the terms of the agreements; the actual constitution is set up by the formalities of corporative life.

In this respect Gierke's ideas as to the creation of the corporation were utterly different from those of the individualistic school. He has well said that the difference between the institutional form of creation of a possessor of social will, that is to have juristic personality, and the *Genossenschaft* form lies in the different sources of the constructive will. In the former case the united collectivity does not set itself up by its own act as a unity, but is set up as such by an external will action. But again the creative action which gives birth to a new unity of will is a one-sided and unitary action. This is true not only of the act of institution by which the state or other holder of public will-power allows the formation of the union-subject, but it is also true enough of institution by private

[1] Gierke. *Die Genossenschaftstheorie*, p. 132. [2] Ibid., p. 133.

will, whether by testamentary disposition or otherwise. In either case it is a matter of creative processes of social law which cannot be subordinated to the rules of individual law.[1]

In Gierke's discussion of the legal relations of corporations he attached great importance to the co-existence of unity and plurality in collectivity. He thought that the rights and duties which attach to the union person form the elements of which the legal spheres of the social will-unities are constituted. For if in a concrete case a corporation as such has rights and duties, this means that the unitary will, which permeates the corporative and institutional organism, is determined as to its competence or obligations (*dürfend oder sollend*) by the objective law. From the legal sphere of a social unity determined in this way the plurality united in that unity is necessarily excluded. If the union person is the subject of rights and duties no other person can be the subject of those rights and duties. All members and organs of the union are, so far as they are persons, not subjects of the legal spheres of union but the subjects of legal spheres different therefrom.

Gierke explained that the whole conception of the juristic person depends on the distinction between unitary right and plurality right both internally and externally. The structure of a social law above individual law stands or falls with that distinction.[2]

But this distinction does not necessitate the same degree and kind of separation in every case; rather it is compatible with the most diverse forms of union comprised within the separation. This fact, Gierke argued, had been ignored by the still dominant Romanist doctrine, which allowed between the union persons and the persons bound together by that union only the same kind of distinction as between wholly unassociated persons, and only the same kind of union as between wholly separate subjects of law.

He proceeded to argue that the legal relations between

[1] Gierke. *Die Genossenschaftstheorie*, pp. 140–141. [2] Ibid., p. 174.

a union person and the persons comprised in the union fall into three categories:—

1. Those in which the organic connection of the parties is entirely ignored. These relations are in the sphere of private law, for every union leaves to its members a sphere in which the individual wills are entirely independent of the union. From this thoroughgoing separation of the unity and plurality it follows that in the sphere thus indicated the connection between the union and its members is simply one of individual legal relations.

2. Those in which the organic connection is absolutely determinant. This is the case in respect of social law, where the spheres of the union entities and of the part entities correspond with one another, and are not separate in principle but are each dependent upon the other and together form the totality. This is a matter of actual legal relationships. As the inner life system of every community is objective law the relations set up between the unity and plurality of the whole are subjective law.

Gierke said "not only has the union rights against and obligations to its members and organs, but the members and organs have rights against and obligations to the union."[1]

Only to the extent to which within a consolidated will-organism the individual will factors are recognised in relation to one another and to the will unity resulting from it, as legal subjects and consequently as persons, has the social law in general and public law in particular the nature of law. But these legal relations are entirely different from pure individual law, because it is essential to them that the subjects concerned in them shall not be treated as separate and self-contained persons on exactly the same footing but as persons of unequal order united into an organic whole. So the union-persons appear as collective persons, and the union and individual persons comprised within them appear as an ascending series of member and organ persons.

Consequently the rights and duties of this group are

[1] Gierke. *Die Genossenschaftstheorie*, p. 182.

founded not on express provisions of individual (personal) law, but directly on the constitutional law of the union or on constitutional practices which have the force of law, and so they continue to be parts of a constitutionally correlated content of the two spheres of law. It is shown externally by the way in which the conditions as to representation differ from those of individual law, for in relation to third parties the collective sphere of the union includes and covers the spheres of the members, but each member sphere is at the same time called upon to represent a definite part of the collective sphere. Internally it is manifest especially in the relations of domination and subordination, which culminate in the subjection of the member spheres to the unitary sphere. Finally the right of the members and organs as such are at the entire disposition of the unitary will which dominates the whole. So long as they continue they are, indeed, real rights *vis-à-vis* the whole, but their continuance is guaranteed only by the internal life-system of the whole and not against it.

This is Gierke's form of the organic theory, which is fundamental to the *Genossenschaft* conception.[1]

3. The third kind of relations between union-persons and the persons comprised in the unions prevails in that extensive sphere where the nature of the relations is the outcome of the interweaving of individual and social rights. Those relations, which can be classed together as relations of corporate and institutional individual rights, are by their very nature governed by rules which treat the organic connection of their subjects as partly important and partly unimportant, and are much more complicated than the simple principles applicable to the two other kinds of relations already described. Very many combinations of the two categories of rights are possible. The rights—and obligations—of this group of relations are distinguished from independent rights and duties by the fact that they are bound up together socially, and they are distinguished from rights and obligations which are purely the result of membership of the union by the fact

[1] Gierke. *Die Genossenschaftstheorie*, p. 183.

that they contain an element of individual right and obligation. That is to say, they devolve upon their possessors neither wholly for their own sake nor wholly for the sake of the collective whole, but rather have a dual purpose. So in the case of public law associations the result is the introduction of some elements of private law into the public law (or of international law elements into constitutional law), and in the case of the private law associations there is a similar blending of individual private law with collective private law.

In discussing at great length the relation of this fundamental principle of the *Genossenschaft* to that of what German law calls the *gesammte Hand*, Gierke began by remarking that between the collective relations created by the *Genossenschaft* combination of unity and plurality and those of individual law there is conceptionally an unbridgeable gulf. Wherever social law and individual law elements are united into a whole, it is not a matter of a mechanical mixture but of an organic union in which unlike remains unlike and difference of order is preserved. So that whilst in regard to the collectivities of individual law one can speak of a tendency to approximate to corporation law, describe them as akin to corporations, and draw a parallel between the individual basic structural conditions and the corresponding ones of corporation law, yet, unless one regards them as corporations, one must not ascribe to them in any degree the idea of nature of corporations. The unique principle of law which had brought about an indisputable approximation to the corporation law cannot be derived from that law; it must be sought exclusively in individual law. Gierke declared that the Germanist theory had satisfied this postulate ever since it had put in its place the Germanic principle of the *gesammte Hand*, with the revival and extension of its old technical name, and made use of it constructively in a clear-cut separation from the *Genossenschaft* principle.

In explanation of the *gesammte Hand* Gierke declared it to be a principle of German law, and not an independent

institute of law but an idea common to a number of institutes of law.[1] Consequently its internal content is not in any way destroyed by the disappearance of forms or symbols of which it was the easily moulded expression in the older German law. And its importance for modern law has not disappeared with the dying out of many institutes of law which were once the main field for its development and application, or with the change in the mode of its application to some institutes which still continue or have been newly formed. The principle of the *gesammte Hand* had already manifested itself in mediaeval law, in the separate community forms governed by it, in very diverse legal tenets. But underlying all of these was a unitary legal idea which Gierke held to be still living and operative.

The fact that something is received or given away by a *gesammte Hand* implies that a number of persons in a body have rights and obligations as a group bound together by a legal tie. But in this union they do not form a juristic person, because in this case in the ruling collective will the individual will of each of them exists and is recognisable as an essential factor, and there is no incorporate collective will independent of the individual wills as an independent union organism. But at the same time they do not appear as a number of independent individuals existing for themselves, though between them there is no legal tie other than their common relations to the same object of domination; they are first put in a relation of reciprocal obligation and only then, as the possessors of the collective will thereby created, are they put in a position of domination. The subject is in fact a united plurality of persons which can equally well be called a united plurality and a collective unity. But this only gives us an empty formula because there is no such thing as an *abstract* union of individuals. Gierke asserted, therefore, that the principle of *gesammte Hand* first receives a definite content from the special content of the tie which embraces its subjects.[2]

[1] Gierke. *Die Genossenschaftstheorie*, p. 342.

[2] Ibid., p. 344.

The principle of the *gesammte Hand* is to Gierke the fundamental legal element in which his idea of *Genossenschaft*, with its harmony between plurality and unity, is revealed. He pointed out that the idea of *gesammte Hand* can be seen in the German communities and law *vis-à-vis* the Romanistic individualistic conception. He indicated that the peculiar nature of the *gesammte Hand* does not lie in any one particular thing but in the general conception of the activity in respect of the law of property of a collectivity based on the law of persons.[1] In this sphere there is a deep cleavage between German and Roman law; for the Roman private law, which in the relation of the subjects to one another had carried through so far as possible the separation of the sovereign individual, attempted the more energetically in respect of the law of property to guard its purely individualistic conception of ownership and other analogously constructed conceptions against being disturbed by the influence of any organic union. In this as in everything else Germanic legal thought had been to a considerable extent overcome by the Roman predominance; but Gierke asserted that there was a large sphere in which it was still unconquered and demanded even from scientific jurisprudence, after long maltreatment, the theoretical and practical recognition of its importance. He went on to say that in detail every legal community of the *gesammte Hand* kind takes its characteristic traits in the first instance from the special form of the association which exists between its subjects on the basis of the law of persons. Originally that association was one of family law with its natural moral basis, and from this family relation he traced the idea which developed into the theory of corporation.

I will next describe the fundamental principle of the *Genossenschaftstheorie* with regard to corporative will and action. Gierke defined the "corporation as being, as an actual collective person, not merely competent in law but also capable of will and action."[2]

"The German *Genossenschaftstheorie*," he said, "enun-

[1] Gierke. *Die Genossenschaftstheorie*, p. 353. [2] Ibid., p. 603.

ciated at the outset that *this* principle came as the inevitable consequence of its fundamental conception into the sharpest imaginable antagonism with the then almost indisputed Romanistic theory, according to which the juristic person, inasmuch as it is a mere fiction, is wholly incapable of will and action and, like persons under age or insane, finds the possibility of any legal activity of its being only by a representation modelled on guardianship." And even in 1887 Gierke could say that this incapacity of will of the juristic person was regarded by most jurists as an incontrovertible dogma,[1] though in actual practice Gierke held that contemporary German law, being inspired generally by the Germanist and not Romanist conceptions of corporations, recognised the corporations as being capable of will and action. That capacity was to him an actuality existing in and with their personality. He held that law attributed personality to the collectivity only because it deemed that collectivity to be the possessor of a unitary and lasting common will. Just as with individuals, we see in that will which is the causative force of outward actions the kernel of legal subjectivity. In Gierke's view the capacity of the union to will and act, like that of individuals, derives from the character of legal capacity; it is not created by the law but is rather discovered by it, and at the same time recognised and limited only in respect of its legal validity. And to the unions, as to individuals, the legal capacity to will and act can be denied by the law, wholly or in part.

Gierke proceeded to argue that if the collectivity's capacity to will and act is, like that of the individual, an actuality which law only recognises and limits, there is yet a special distinction to be made in respect of the relation of the legal system to the life-system of the personality. For the functions of law are not exhausted in this case, as they are in the case of individuals, by the work of external recognition and limitation; law comprises and permeates the whole inner being of these persons formed out of persons. The system of forming and giving

[1] Gierke. *Die Genossenschaftstheorie*, p. 604.

effect to the collective will is both capable of, and needs, regulation by legal norms. It is capable of it because the inner life of collective persons attains actuality only in the outward life of its member persons. But it also needs it because these member persons are for themselves at the same time individual or collective persons capable of will and action, and consequently it is impossible to do without some external mark and distinction of those will actions which belong to their corporate life. Consequently all those processes which translate an act of will into a deed, which in the case of the individual are beyond the reach of legal regulation and are a matter of legal concern only as elements of an externally manifested action from which their presence can be deduced, come within the sphere of regulation by constitutional law. But at the same time all will and action which are derived from the organic combination of a social body appear as corporate will and action only in so far as they correspond to this constitutional regulation.[1]

Gierke pointed out that, as a consequence, there emerge in the sphere of corporative will action new legal conceptions which have no parallel in the law of persons. That applies especially to the conception of *organs*. The fact that the juristic person can will and act only through organs does not differentiate it from the physical person, for that is on the same basis. The personality which in its indivisible and complete spiritual unity is beyond the reach of sense-perception has contact with the visible world only by means of physical organs, and in the realm of law as in every other relation of life is grasped as the real subject of will and action only by a process of abstract thought. But only the juristic person has organs in the legal sense. For whilst the organs of the individual person function in the realm of law, in accordance with the natural system of the individual human organism, as the instruments of the physical unity which animates it, the organs of the corporative person manifest the unity willing and acting in that person in the realm of law in

[1] Gierke. *Die Genossenschaftstheorie*, pp. 612–614.

accordance with the legal system of a social human organism. The conception of organs is given the stamp of a legal conception by the constitutional law of the collectivity and by that alone. It finds no pattern in individual law and cannot be replaced or elucidated by any conception which has not originated in social law; it has its own special juristic content and is without parallel.[1]

Gierke next pointed out that the scope of corporate capacity of will and action is determined by the scope of corporate legal capacity. For on the one hand the collective person like the individual person cannot acquire and exercise rights and duties which it may not have, but on the other hand it can when in doubt take such legal action as may be necessary to secure and exercise the rights and duties appropriate to it. In this respect from a dual point of view the sphere of corporate capacity of action is confined by the legal system within narrower limits and is consequently inferior to the sphere of corporate legal capacity.

In the first place the corporative person can will and act legally only within the sphere allotted to it by the law. The legal system ascribes to the collectivity, as it does to the individual, in and along with the recognition of personality, its own life purpose. But whilst it only assumes the life purpose of the individual it determines of itself the life purposes of the unions. From differences of purpose there arise differences in the relations of the unions to their members, to other unions and finally to the state.[2]

Every limitation which is set to the life sphere of a corporation by the system of public law or any other higher legal system is as binding on individuals as it is on juristic persons, but with the co-operation of the state or other possessor of the superior power of will it can be exceeded in definite instances.[3] This brings us to one of the most interesting points of Gierke's *Genossenschafts-*

[1] Gierke. *Die Genossenschaftstheorie*, p. 615.
[2] Ibid., pp. 632–633. [3] Ibid., p. 640.

theorie, namely the restrictions on corporate will and action which arise from the principle of the limitation of the corporate life by the collective life which is superior to it. This kind of limitation imposes itself in every consolidated corporation on its individual collective-members, to each of which there is admittedly assigned along with its own personality a sphere of will-power of its own whilst at the same time its membership of a social collective organism imposes on it some measure of dependence upon the collective personality which comprises it. And first and foremost such a limitation is created for every union by the fact of its subordination to the state. For the state, because as the highest collectivity in the realm of law it includes within itself every other collectivity, assumes a general supremacy over all corporations, and by virtue thereof claims to exercise an influence on all collective will-forming to which it gives recognition as such.[1]

Gierke asserted that "the state alone cannot be subordinate as sovereign collective person to any organised will power external to and above it, and consequently it cannot be limited in its will and action by a higher community participating in its decisions."[2]

As soon as the state manifests itself not as an independent state personality but in an association of states with a unitary collective personality and plural individual personality, then within the sphere of the state life there arises a relation between the member person and the collective person analogous to that which exists in the consolidated corporation.

In all these cases it is a question of the peculiar limitations of the collective capacity of will and action. The great differences which can be found do not exclude the uniformity of the juristic type. Even the specific factor which derives the relations to the state from the sovereignty of the latter leaves untouched the inner nature of the relations between collective wills of unequal order.

On the other hand there are phenomena of social law

[1] Gierke. *Die Genossenschaftstheorie*, pp. 641–642. [2] Ibid., p. 642.

which have no exemplars in any legal institute which is possible within the system of being of a complex entity of social life. And in particular such an exemplar is not furnished by the limitations which are imposed on individual will and action by the fact of the inclusion of individuals in the state and other collectivities. "Because," as Gierke said, "in contrast to all legal combination of the wills of individuals it is here a matter of a combination of wills which extends to their inner life, like that which the highest earthly union is able to impose on any person comprised within it only in so far as the inner life of that person can be affected by law because it is a collective life."[1]

Gierke pointed out that, in contrast to the doctrine thus enunciated, an old and influential theory tried to explain the influence of the state upon the corporate will and action as being a kind of guardianship and super-guardianship on the model of that of the law of persons. This theory, however, stands and falls with the conception of the juristic person as an artificial person incapable of will, like children or the insane.[2]

Finally I will indicate Gierke's conception of the precise nature of the authority of the state over corporations as determined by the fact that all are members of that collectivity (the state) which is in the legal sphere supreme.

In the first place there is the influence which the state as law-giver exercises on the form and content of the corporative will-action. This is a matter not of a special relation of the state life to the corporate life, but only of the consequences of the general relations of the legal system to the collective life. If that life is capable of determination and limitation by legal rules, the state can include the enunciation of such rules within the scope of its legislative power. Accordingly the modern state can by virtue of its formal legislative supremacy regulate the whole of corporate will and action without encountering any limitation other than the internal one imposed on it

[1] Gierke. *Die Genossenschaftstheorie*, p. 643. [2] Ibid., p. 643.

by the demands of the idea of law. Subject to that test the state can on the one hand, in respect of the inner life system of every collective person, replace or extend ordinances and customary law by statute law, and on the other hand it can draw a line of demarcation between the spheres of will of itself and of other unions.

But as for that purpose the state must make use of the method of legal ordinance and consequently act in particular forms by its own legislative organs, it serves them as the formal sovereign law-giver and at the same time gives effect by its own pronouncements to the postulates of a principle of reason which is operative even against the state's own will to power. So Gierke concluded that the state's legislative power does not introduce its will to power into the other social organisms but makes it the supreme agent of that power of law which embraces even the inner life of the collectivity and binds it together.[1]

Secondly, Gierke held that the influence which the state as judge has on the life of the less comprehensive unions has nothing to do with the limitation of corporate will and action by a higher will-power. For the task of the courts of justice is simply to declare the limitations imposed by law in each individual case. Accordingly the modern state, "as the supreme guardian of the system of law," has the final decision in questions relating to the life of corporations.[2] In this again the state influence has nothing to do with a will-power intervening in the inner life of the less comprehensive unions, but with the all-permeating power of law.

But thirdly Gierke declared that the state, as administrator, is actually called upon by the system of law to discharge a special function of its power of will, in the sense of restricting the self-determination of all the collective wills comprised within it. For the state administration, as a free life activity for which law sets up only motives and limitations, makes the general will effective as such *vis-à-vis* all individual wills. In so far

[1] Gierke. *Die Genossenschaftstheorie*, pp. 648–649.
[2] Ibid., pp. 649–650.

as the collective entity is on the same footing as the individual entities they are affected only externally by the action of the state will. But conversely so long as a collectivity or its organ as a state organ exercises state functions transferred to it, its life is merged in the life of the state. But in so far as on the one hand the collectivity is given, as such, its own sphere of operation, and on the other hand the state has power over the conduct of the collective life in that sphere, there comes into existence a unique form of administrative activity in which there is manifested the inner control of the less comprehensive collective will by a collective will of a higher order. This particular form of administrative activity is nowadays commonly called "supervision."[1]

Within the meaning of the "legal state" this supervision can be exercised only within the limits of fixed legal rules which legislation has to formulate and the courts to enforce.

Gierke pointed out that there is normally a permanent state supervision only over public corporations, whilst in respect of merely private corporations modern law shows a tendency to leave in abeyance the exercise of state supervision over the normal course of the life of the union, and to exercise it only in defined cases of abnormal disturbance of that life.

Further, Gierke pointed out that the state is in modern times called on to determine the appropriateness of a corporative act done under its supervision. But he asserted that "in contrast to the police state, the legal state does not normally take upon itself, in regard to public as well as to private corporations, anything more than the examination of the legality of their conduct. To-day in principle there is guaranteed to every corporative person freedom of will within its own sphere of activity, and only in prescribed cases does a still more free decision of will of the supervising state intervene in its internal affairs."[2]

Gierke remarked further that the state supervision

[1] Gierke. *Die Genossenschaftstheorie*, pp. 651–652. [2] Ibid., p. 655.

differs according to the nature of the parts of the corporative life which are subjected to it. In the first place it is directed to what may be called a "negative" conduct of the collectivities. In this respect it may be concerned with the totality of the union life, in so far as its purpose is to see that the corporation does not go beyond its sphere or pursue aims which are really alien to it, or with particular acts of the corporation which it regards as inexpedient. But secondly the supervision may relate to the positive behaviour of the subordinate collective wills—when in the public interest the state has to insist on the corporation carrying out its purpose, at least in essentials. This relation exists normally in the case of public corporations, whose fulfilment of the purpose of their existence is commonly deemed to be a duty to the state.[1] The state supervision of this kind may equally well apply to particular matters.

According as the control has a negative or positive purpose it is exercised by prohibitions or commands. But to those must be added "authorisations," i.e. administrative acts by which the state sanctions an action or allows an omission.[2]

In respect of both these passive and active rights of supervision, Gierke pointed out that the corporative decision of will is only extended, and not replaced, by the state decision of will. Consequently in the sphere of supervision an internal want of a collective determination of will can never be remedied by state approval. But if the state by law or constitution is called upon to do some unilateral act of will within the regular process of life of a juristic person, the state is no longer only superior to that person but is at the same time absorbed into it. Thereby a state institutional element is introduced into the union organism and modifies the conception of corporation in the sense of that of institution.

It follows that from these rules of law which establish and limit the binding together of collective wills by higher collective wills there arises a number of subjective

[1] Gierke. *Die Genossenschaftstheorie*, p. 657. [2] Ibid., p. 658.

rights and duties. These differ greatly in content, but are ultimately the outcome of two opposite basic personal rights—that of the superior collective personality to the personality of its consolidated members and that of the subordinate collective person to the freedom of its own personality.

So Gierke concluded that "in its application to the state union of juristic persons, the former of these two rights is called the corporation supremacy (*Hoheit*), i.e. church, communal, institution supremacy, etc., and the latter right is called the corporate, i.e. ecclesiastical, communal, *Genossenschaft* right of self-government."[1]

§ 2

The theory of the state which Gierke formulated from the standpoint of his *Genossenschaftstheorie* had itself much that was novel. It was based on his presentation of the evolution of the state as a gradual synthesis of corporation and institution[2] and on his survey of the history of theories of the state. He therefore turned in the third volume (1881) of his *Genossenschaftsrecht* to the history of the theory of the corporation (which involved part at least of the history of the theory of the state) up to the time of what is known to German historians as the "Reception" (i.e. the introduction into Germany of the ideas of Romanist-Canonist jurisprudence), and expounded that history with a wealth of detailed learning.

There were three independent systems of thought in which the ancient world had formulated theories as to the legal nature of unions, those three systems being (1) Greek philosophy, (2) Roman jurisprudence, (3) Christian theology.[3]

To the Greek mind the conception of human society was originally identical with that of the city state, consequently there developed only one "science of social life,"

[1] Gierke. *Die Genossenschaftstheorie*, p. 672. [2] Cf. pp. 103–106.
[3] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 7.

namely the philosophical theory of the state. In Greek philosophy and general opinion alike the state, in the most comprehensive sense of the term, meant "a positive and independent whole, having an inherent and original life of its own"; the separate life of individuals was recognised, but only within the common life, which was of a higher order; the individual did not exist for himself, but only as a means of attaining the purpose of the whole. The Greeks regarded law as the harmonious ordering of the common life; they developed the idea of the state as something "in which laws hold sway," and by so doing they did incalculable service to mankind. But this was wholly in the sphere of objective law. This was true even of the conception of that natural law which was brought into being by Greek philosophy and became more and more distinct from positive law.[1] And as the Greeks had no independent conception of subjective law, so an independent conception of the legal subject was equally lacking.

This lack was manifested in respect not only of the individual but also of the state. Greek philosophy gave to the world the classical expression of the idea of the unique nature of the state, but never attained to the idea of the *personality* of the state; it never conceived of the state as different from individuals. Plato presented the state as a magnified human being, as a Mesocosmos interposed between the Macrocosmos of the universe and the Microcosmos of the individual; his whole doctrine of the state is an anthropomorphic application to the collectivity of his psychology and ethics.[2] The state is like a man, and differs from him only as the large differs from the small; it must therefore be a unity, in which the parts are of use only to the whole. And yet Plato never even hinted at the personality of the state. Gierke remarked that Plato's state "is the concrete totality of everything contained in it; it is thought of as a unitary whole, but never as a unity in the whole; it is the plurality

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 10. [2] Ibid., p. 14.

become unity, but not the unity living in the plurality and as a person independent of it."[1]

Aristotle regarded the state as a living organism. He rejected Plato's doctrine of the state as a magnified man and argued against the contention that in its nature the state showed the closest possible approximation to the nature of a human being. He realised that the state is a combined organism, and that because it is made up of a number of diverse parts, reacting upon and supplementing one another, it was therefore a whole superior to the individuals and involved the idea of plurality in unity. But even he failed to deduce from this the personality of the state. He stressed, in a way which has influenced all subsequent thought, the difference between the whole and the sum of the parts, between collective unity and collective plurality; but this difference was to him simply that between the collective and distributive consideration of a united plurality. The state therefore remained to him a κοινωνία, a society or community; the πόλις was to him fundamentally not what we call the "state" but rather the "civic community (*bürgerliche Gesellschaft*)"; and this could not give rise to the idea of "union personality."[2] So although, in direct contrast to Plato, he tried to separate the collective life-sphere of *all* from the particular life-sphere of *each*, he derived this separation, just as Plato derived their consolidation, from the objective system needed for the harmonious working of the organism, and not from the recognition of two independent subjective centres of law.[3]

The Roman philosophy of Cicero did not go much beyond Aristotle. Cicero regarded the state as an organism possessed of a life of its own, and distinguished between the unity of the collective body and the plurality of the members. But to him also the unity of the state consisted only of the community of its members—it was a *societas*, a *coetus hominium congregatus*; he never gave expression

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 15.
[2] Ibid., p. 17. [3] Ibid., p. 18.

to the idea of state personality, though he could not wholly exclude from his philosophical theory of the state the conception of legal subjectivity which was clearly developed in the Latin consciousness.

The effect of this general philosophical view was the impossibility of the existence of any union wholly or partly co-ordinate with the state; the only unions possible were those which included the state or were included within it. The only one of the former class was the world, regarded as a unit—an idea of very great importance for the history of political science but not leading to the immediate conclusion that the world thus made up of states was a higher collective organism. The unions of the second class were parts of the state—the family, the village community, the voluntary association—but only weaker copies of it.[1] It is understandable that in these circumstances the generally accepted considerations as to unity in plurality and plurality in unity had no direct relation to the question of legal subjectivity,[2] though the ideas of the Stoics as to possible unity relationships in plurality did influence the Roman jurists.

Like the Greeks, the Romans had from the earliest times seized upon the objective idea of law as a correlative to their idea of the state and set the law, as the governing system of all collective life, above the arbitrariness of individual wills. But the fact that they made of law something independent *vis-à-vis* the state was due to their grasping the subjective idea of law. Will, operative in a sphere recognised and defined by objective law, but not created by it, was to them a creative principle, and consequently they were from the very first familiar with the conception of the legal subject. The legal subjectivity of Roman law was concentrated in two sharply distinguished possessors of will. All that effective will which was called *jus* derived either from the *populus Romanus* or the *paterfamilias*—the one exercising the sovereign will of the people (*jus publicum*) and the other the sovereign

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, pp. 26–30.

[2] Ibid., p. 31.

individual will (*jus privatum*).[1] Of the latter the *paterfamilias* was the centre; in it certain persons were recognised by the Roman state as the sole and sovereign and self-determined possessors of effective will within their spheres; objective law determined those spheres for all alike, but within the limits set the individual will was uncontrolled. But as there existed a number of such wills there necessarily soon came the determination and formulation of the common characteristics of this legal subjectivity. And so there developed within and for *jus privatum* the conception of the "person," for which at first the old term *caput* was employed, but was soon replaced by that of *persona* with a mere abstract connotation.[2] The Roman conception of *persona* was therefore from the outset an individualistic one.

But the Roman conception of the union or association (*Verband*) is to be found only in the *jus publicum*. Strictly, that law recognised only one legal subject—the Roman state. But that state, though regarded as a union whole comprehending and defining all personality, was never described or thought of as *person*. And even when the idea of state legal subjectivity was reached, the Romans never spoke or conceived of state personality.[3]

Gierke pointed out that in the last resort it was not possible to assert that the juristic person had a real existence. As a being of public law the *universitas* was a real unity, but not a person; as a subject of private law it was a person, but not a real unity. Only a human being could be a person, because he alone could be an *individuum*, and only an *individuum* could be a person. So Roman jurisprudence was driven to the position that the personality of the *universitas* was a fiction, and the whole law of corporations culminated in the principle that in this case positive law gave personality to a non-person.[4]

Christianity, by transforming the ideal of the terrestrial

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 35. The distinction here indicated must not be confused with the modern distinction between public and private law.

[2] Ibid., p. 36.

[3] Ibid., pp. 43–50.

[4] Ibid., p. 103.

state into that of the Kingdom of God, destroyed the foundations of the ancient theory of society. The theological speculations of the Fathers, and especially of St. Augustin in the *De Civitate Dei*, made of the Church, as the ancient philosophers did of the state, a living organism, an independent and unitary whole, but they gave to it a new, mystical-religious meaning.[1] This Christian theology, which had an immense influence on the Roman Empire and its jurisprudence, gave to the absolutist monarchical state which existed at the end of the ancient world a new title and a wider sphere, but nevertheless the *corpus juris civilis* did not hand on to posterity any specifically Christian conception of state and law, but only a pagan Roman conception decked with Christian trimmings.[2]

The conception of person in the *corpus juris* belongs only to private law. The public law legal subjectivity is not an enlargement, it is the negation, of the conception of person; "the state as such stands as an impersonal collectivity above and outside of the legal system determining and limiting personality, whilst all other unions, being parts and members of the state whole, lack an original sphere of public law of their own."[3]

The *corpus juris civilis* undoubtedly prepared the way for the creation of the jurisprudence of the Middle Ages which gave the background to Gierke's elaborate exposition of the German *Genossenschaftsrecht* and its underlying theory. He pointed out that a scientific theory of corporation arose in the Middle Ages first through the exposition of the material contained in the *corpus* and consequent theoretical speculation as to the legal nature of unions.[4] The foundation of that theory was laid by the Commentators (*Glossatoren*), who in their thorough scientific examination of the sources of the *corpus* not only were compelled to restate the theoretical views already expressed by the Romans as to the legal nature of unions, but also in the attempt to make these older ideas into

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 108.
[2] Ibid., p. 128. [3] Ibid., p. 135. [4] Ibid., p. 188.

the subject-matter of their own thought gave to modern jurisprudence a speculative element which was quite alien to the Roman mind. And so in dealing with the corporation problem they raised the issue whether, and to what extent, the *universitas* is identical with the sum of its parts. But the Commentators did not get beyond the rudiments of a theory of corporation. They derived from the sources the idea that the corporative union is as such a unitary subject of law, and that the *universitas* as such does not alter with the change of its membership, but they did not reach the point of ascribing to the *universitas* personality. Nowhere in the Commentators is there any mention or conception of the "juristic person."[1]

Nevertheless the doctrines of the Canonists gave a great impetus to the development of the *Genossenschaftstheorie*, i.e. as a conception of organism and personality. The fact that the conception of the juristic person formed the kernel of ecclesiastical law inevitably directed the attention of Canonist jurisprudence, as soon as it developed, to the consideration of that conception. Consequently the Canonists early gained a decisive influence, and from the thirteenth century the conception took an ecclesiastical stamp which endured for centuries. But gradually there was an approximation of the Canonist and civilian jurisprudence and the development of a unified Romano-Canonist dogma; in the last centuries of the mediaeval period the Canonists took as much a part as the civilians in the development of that common dogma, but they did not contribute anything specifically Canonist to it—and indeed the old Canonist ideas became blurred even in the sphere of purely ecclesiastical law.[2] As the Church was a divine institution, its collective membership and organisation depended not on the *Genossenschaft* principles, but on the ordinances of God, and so in the hands of the Canonists the conception of corporation took increasingly an institutional significance.[3] The main Canonist contribution to the development of the *Genossenschaftstheorie*

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 247.
[2] Ibid., p. 247. [3] Ibid., p. 254.

was the conception of the juristic person. Roffredus put forward the idea that every *universitas* is an *individuum*; Innocent IV wrote of the "fiction" of a unitary personality; the Commentators and Durantes wrote of a *persona universitatis*, *collegii*, or *municipii*; and Johannes Andreae asserted that the *universitas* is a person.[1] But the Canonists went farther, and speculated as to the nature of this person. Innocent indeed may be said to have rediscovered that idea of the purely conceptional and fictitious nature of the juristic person—which had prevailed, though only half-expressed, in Roman law—and so clearly formulated it that he may be called the father of the doctrine which still prevailed when Gierke wrote.[2]

But the Canonists also inclined to the Germanic view which regarded the corporation as an organic collective being (*Gemeinwesen*) and the juristic person consequently as the living entity dwelling in the collectivity and the collectivity as the organism embodying that unity.[3] And they based their acceptance of the "majority principle" on the juristic fiction that what the majority desired must be deemed to be the will of all.[4]

From the middle of the thirteenth century the civilian theory of corporation underwent a process of elaboration which was determined very largely by its acceptance of the dogmatic basic ideas which had been developed by the Canonists. The process was a gradual one; it culminated in the work of the great Bartolus, who, though himself a creative force, accepted some Canonist dicta as axiomatic and made them into a permanent part of that later jurisprudence in which his name carried for centuries such great authority.[5] The conception of corporation remained, broadly speaking, identical with that of the juristic person generally.

The more the civilian lawyers were influenced by the Canonist theory, the greater was their tendency to base the nature of the corporation on a legal fiction by virtue

[1] Gierke, *Das deutsche Genossenschaftsrecht*, III, p. 279.
[2] Ibid., p. 280.
[3] Ibid., p. 284.
[4] Ibid., p. 323.
[5] Ibid., p. 354.

of which personality was attributed to the union as such.[1] Especially was this the case with the *universitas*, to which the conception and name of "person" was deliberately applied. But this person was contrasted with the "true" person as a conceptional person—the *persona representata*, which was recognised as the product of a fiction and called expressly *persona ficta*. Bartolus referred to this personality as a *fictio juris*, and to jurisprudence as its creator, in a way which closely resembles the modern use of the term "juristic person."[2]

Bartolus' greatest contribution to the whole matter was his attempt to distinguish between sovereign and non-sovereign collectivities (*Gemeinwesen*), *universitates quae superiorem non recognoscunt* and *universitates superiorem recognoscentes*. To the former were assigned more and more the Roman attributes of the state; there were claimed for them the rights which in the sources were expressly reserved to the Emperor (e.g. that of making war and alliances, supreme legislative and judicial powers), and so there was marked off from the general body of corporations a particular class in regard to which the conception of corporation was magnified into that of the state. And, as the decisive characteristic of this distinction, discovery was made of the conception of sovereignty. But "at first sovereignty remained the sole feature which distinguished the authority of the state from that of any other union, and the state conception remained the supreme application of the conception of corporations."[3] But the structure of mediaeval life had the result of the recognition of a communal and corporation authority which in its sphere differed from that of the state in degree rather than in kind. There was at first only the germ of the thought which later brought in the attribute of exclusiveness, and prepared the way for the subsequent absorption of all public law into the state.

To the *universitas superiorem recognoscens* a sphere of public authority of its own was attributed, with powers

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 362.
[2] Ibid., p. 363. [3] Ibid., p. 382.

which approximated more or less to those of the sovereign collectivity. The corporation was considered in relation to its members not only as a co-ordinated individual, but as a higher unity which had authority (*potestas*) over the individuals; and the juristic person as such was treated as the subject of this power.[1]

The Romano-Canonist corporative theory had filled the gap between the Canonists' conception and the publicist theory of the fourteenth century, which started from the whole but ascribed an intrinsic value to every part-whole down to and including the individual. Whilst in the predominance assigned to the whole over the parts it was in accord with ancient thought, and in its emphasis on the original own right of the individual it approximated to the later doctrine of the law of nature, its own special conception was that of the whole system of the universe as only a single articulated whole.

But each particular communal or individual entity is at once a whole determined by the world purpose and a smaller whole with its own special purpose, and so every earthly union must appear as an organic member of a divine state embracing heaven and earth, and there developed the idea of a divinely ordained harmony permeating the universe and all its parts.[2]

The constituent principle of the universe is unity; God as the unitary Being precedes and dominates the world plurality and is the unique source and purpose of all being; the divine acts as the unitary government of the world, which moves all plurality to a single goal. But as the one comes before the many, and all plurality has its origin in unity and returns to unity, all system depends on the subordination of plurality. Gierke said: "Not otherwise can it be in the social order of mankind," and he added: "Here also every plurality which has a common aim and object must in relation to that aim and object find its source and norm and goal in a ruling unity, while, on the other hand, each of those parts which constitute the whole must, in so far as that part itself is

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 383. [2] Ibid., p. 514.

a whole with a final aim and object of its own, itself appear as a self-determining unit. Unity is the root of all, and therefore of all social existence."[1]

Along with this conception of the universal union of mankind the division of this union into the dual organisation of the spiritual and temporal orders of life was accepted by the Middle Ages as a divine ordinance.[2] "The 'antique-modern' concept of the state-unit as an absolute and exclusive concentration of all group-life gradually took shape inside the mediaeval doctrine, and then, at first unconsciously but afterwards consciously, began to break into pieces the edifice of mediaeval thought."[3]

The mediaeval conception of mankind as organism was that of a *corpus mysticum* wherein the spiritual and corporeal orders of life were only two sides of one great organism, in which they must be in harmony with one another and permeate one another in the whole and in every part.[4] The idea of monarchy came into existence because the mediaeval age regarded the universe as a unitary empire and God as its monarch; all earthly dominion was a "limited representation of the divine rule of the universe." As the essence of the social organism was unity, and as that unity must be manifested in a ruling part, it was held that the task of rule could best be carried out by a unit, and consequently by an *individuum*. Dante expressed this doctrine most clearly in the assertion that in the political body the unifying force was will-power, and best the will of a single man.

The publicists thus came to assert that the monarchy existed *iure divino*, and so from the middle of the twelfth century there appeared at the side of the mediaeval idea of the monarchical office the beginnings of a doctrine of sovereignty which in its monarchical form made the one and only ruler into the holder of an absolute plenitude of authority.[5] From the period of the Hohenstauffen the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, pp. 515–516.
[2] Ibid., p. 518.
[3] Ibid., pp. 545–546.
[4] Ibid., p. 548.
[5] Ibid., p. 566.

plenitudo potestatis of the Roman Caesar was claimed by the jurists for the Emperor, although even the mediaeval absolutist doctrine recognised that the monarch thus made sovereign had obligations and limitations.

A decisive recognition of an original and active right of the collectivity in every human union was characteristic of the mediaeval publicist doctrine; the dispute was as to its nature and scope. The Germanic idea of *Genossenschaft* forced its way.[1] Combined with elements derived from classical antiquity it tended increasingly to give to the mediaeval lore of the right of the community the stamp of the modern doctrine of popular sovereignty. Gierke said: "As even in the Middle Ages the thought of popular sovereignty was connected in manifold wise with the thought of the ruler's sovereignty, there was here a foundation on which the most diverse constitutional systems of an abstract kind could be erected; systems which might range from an absolutism grounded on the alienation of power by the people, through constitutional monarchy, to popular sovereignty of the republican sort."[2]

As regards the source of the highest worldly power, Gierke pointed out that the jurists could find in the *corpus juris* positive warrant for regarding the will of people as the basis of authority.[3] And as regards the conception of personality Gierke declared that already the Church was conceived, and so was the state, as an organic whole which, despite its composite character, was a single being, and the thought might have occurred that the personality of the individual consists in a similar permanent substance within an organism.[4] But nothing happened except the establishment of the idea of *persona ficta*. The growing influence of the idea of state sovereignty gradually shattered the mediaeval theory and planted the "seeds of the later natural rights systems of ruler sovereignty, popular sovereignty and divided sovereignty—with their partly centralised and partly atomistic but in all cases

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 568.
[2] Ibid., p. 569. [3] Ibid., pp. 570, 599–600, 602–603.
[4] Ibid., p. 607.

simply mechanical construction of the state legal subjectivity."[1]

Quite differentiated from the old German "legal state" the mediaeval relations of law and state were subject to the rules of natural law. Gierke said that those rules "were as superior to the Pope as to the Emperor, to the ruler as to the sovereign people, indeed even to the whole community of mortal men," and that "neither statute nor act of government, neither resolution of the people nor custom could break the bounds thus set—that whatever contradicted the eternal and immutable principles of natural law was utterly void and would bind no one."[2]

Consequently in the Middle Ages there was hardly even a faint glimmering of that idea which would free the sovereign, in the effort to serve the common good and for the sake of a higher purpose, from the bond of the moral law in general and therefore from the bond of the law of nature.[3]

From this general doctrine of the mediaeval publicists Gierke deduced the beginning of the modern state. The essential fact of the process of development is that even in mediaeval theory there was early manifest the tendency to widen and elaborate the spheres of the highest generality on the one hand and of the individual on the other, at the cost of all intermediate unions.

So the sovereignty of the state and the sovereignty of the individual came to be more and more the "two central axioms" on which all theories of social structure were based and on whose reciprocal relations all issues of principle turned. And already there were signs of that linking up of the two principles which was characteristic of the later natural right system "which combined the absolutism of the state, the result of the renaissance of ancient theory, with the modern individualism which was the outcome of the Christian-Germanic idea of liberty."[4]

In respect of the question of the origin and legal basis of the state there developed slowly the natural right theory

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 609. [2] Ibid., p. 611.
[3] Ibid., p. 627. [4] Ibid., p. 628.

of the social contract. There was general agreement that originally there was a "stateless" condition of nature, in which natural right held sway, and consequently all men were free and equal and property was held in common. Gradually the state position had come about. Although advocates were not lacking of the theory of organic development which taught that the state had grown out of the aboriginal community, i.e. the family, the prevalent doctrine was that nature was only a *causa remota* or *impulsiva*, and that "every union of men in a political bond was an act of rational human will."[1]

Whilst there was a notion that the setting up of the state, like that of other human institutions, might be the coercive or peaceful act of an individual founder, the general trend of thought was directed towards the hypothesis of the original, creative act of will of the whole unitary community. This collective act was thought to be comparable to that of the voluntary formation of a corporation, and no special legal conception of it was formed. The jurists could not form such a special conception because, though they distinguished the *universitas* from the *societas*, they confused the unitary act of the collectivity which made itself into a unity with the enforceable agreement between individuals. And so the mediaeval theorists were driven to include the momentary state act of union in the category of social contracts.[2]

At the end of the Middle Ages the hypothesis of state origin tended towards a twofold conception, of the original sovereignty of the individual as the source of all political obligation, and of the sovereignty of the state which, once created by contract, was vested with the irrevocable characteristic of a contract sanctioned by the law of nature with state absolutism. With the acceptance of this fictitious contract and the departure from the early mediaeval ideas, there was a reversion to the ancient idea of the purpose of the state as being that of securing the "happy and virtuous life, the realisation of public weal and civic morality." Gierke asserted that the "mediaeval

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 629. [2] Ibid., p. 630.

doctrine prepared the way for the great revolutions in Church and State, and this it did by attributing a real working validity as rules of natural law to a system constructed of abstract premises and planned in accordance with the dictates of expediency."[1] The whole internal structure of the state was regarded from the standpoint of reason, and the whole "art of government" was subjected to the theoretical principle. In the sphere of public law the prevalent endeavour to create a state structure which should conform to natural law manifested itself primarily in the revival and development of the old conception of sovereignty.[2]

With regard to the two divergent conceptions of ruler and popular sovereignty in connection with the natural right theory there was firstly unanimous agreement that sovereign power, though raised above all positive law, is limited by natural law, and secondly a clear understanding that the idea of sovereignty by no means excludes an independent legal claim of non-sovereign subjects to participate in the power of the state. The interaction of these two contrasting ideas of sovereignty made possible the conception of limited sovereignty, of a "mixed" constitution, of the separation of powers, and of the representative system.[3] But the steady advance of the notion that "the state is the exclusive all-comprehensive community" brought the downfall of the early mediaeval ideas of community and did not reflect the Germanic *Genossenschaft* conception. The final result was the acceptance of state absolutism.[4]

In Gierke's view the modern state is the outcome of the struggle between the sovereign state and the sovereign individual as to the delimitation of the spheres assigned to them by natural law, and in the course of the conflict all intermediate organs were degraded into the more or less arbitrary creatures of mere positive law, and were in the end eliminated.[5]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, III, p. 632.
[2] Ibid., p. 633.
[3] Ibid., p. 634.
[4] Ibid., p. 635.
[5] Ibid., pp. 634–644.

So Gierke asserted that the modern state, as we understand it, is the theoretical creation of ancient philosophy and of the natural right theory, with the conception of sovereignty.

§ 3

The modern state has its theoretical origin in the idea of social contract, and the natural law theory tends to understand by the term "sovereignty" not only a unique characteristic of the state but also the state authority itself in its essential condition.[1]

He pointed out that since Bodin set up the "majesty" of authority in sovereignty, and until or even after Hobbes attempted to close the conflict between rulers and popular sovereignty, the "particular personality, which can naturally be nothing but its original personality," could not be entirely ignored. And the popular personality must be established in the sense of a pure collective personality, because it came into being before and without any obligation.

Therefore Gierke wrote that "In so far as the theory of social contract prevailed, the result of referring the popular community back to a contractual act was to block every way out of the individualistic sphere of thought."[2] He added that "the sovereign collectivity which proceeds from the contract concluded between independent individuals cannot raise itself above the level of an aggregate of individuals."[3] If the conception of the social contract is consistently applied, the whole law of the collectivity would be from the outset nothing more than consolidated individual law, and the internal bond of the collectivity of people would be dissolved into a network of obligatory legal relations between individual members. Thus in the writings of Althusius the idea of social relations permeated the consolidated state, although he laid great stress upon the corporate nature of the state. Similarly Grotius

[1] Gierke, *Das deutsche Genossenschaftsrecht*, IV, pp. 276, 286–287.
[2] Ibid., p. 295. [3] Ibid., p. 296.

erected an edifice of social relations within a corporative framework.[1]

In this respect Gierke argued that if the inner co-operation of a national collectivity (*Volkesgemeinschaft*) is limited to the mutual rights and duties of all the individuals, the unity necessary to the people as a subject of law can be brought out only by the external consolidation of the coalescent individuals. Consequently the conception which was dominant in the natural law theory was simply one which regarded the personality of a nation as a mere aggregate; the nation was identical with the sum of the members of the nation; but when there was need for a unitary possessor of the nation's rights, it was treated as a unitary aggregate.

Therefore Gierke asserted that the whole difference between unity and plurality in collectivity rests only on difference in ways of thinking, according as one treats *omnes ut universi* or *omnes ut singuli*. But the living and enduring unity of being seems to the gaze which is directed to "reality" to be merely a bodiless phantom, and the elevation of such a unity to the status of a person seems to be the work of a juristic fiction. As the general will can hardly be found in the unity of the wills of individuals, a new fiction became necessary in order to justify the giving to the majority will a validity equal to that of the collective will.[2] In antithesis to the people a special ruler personality had been recognised as the subject of authoritarian rights. Even the pure theory of popular sovereignty, so long as it held to the idea of a government set up by contract—an idea first overthrown by Rousseau—could not escape from the admission of an independent ruler personality. But this ruler personality differed according as the rule was vested in a collectivity or in an individual. With the latter it was a "natural" unity—that of the monarch; in the former it was an "artificial" unity.[3]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, p. 297.

[2] Ibid., p. 303. *Über die Geschichte des Majoritätsprinzips*. In *Schmoller's Jahrbuch*, 39. Jahrgang, Zweites Heft, pp. 22–24.

[3] Gierke, *Das deutsche Genossenschaftsrecht*, IV, pp. 304–305.

The dualism of the people's and ruler's personality, which was a continuation of the characteristic of the mediaeval state based on a system of estates was, Gierke held, in sharp contrast to the modern state's need for unity. Consequently in the theory of natural law there was an inevitable tendency to get rid of this contrast by developing the conception of a unitary state personality—though the attempt was never wholly successful, in that it never attained to the true idea of a state personality, but only to that of a one-sided enhancement of either a nation personality or a ruler personality.

Nevertheless the classical and mediaeval idea of the state as an organic whole never wholly died out.[1]

In the conflict between popular and ruler sovereignty, up till Bodin's absolutist conception of sovereignty, there was without exception deduced from the nature of the state a limitation of the sovereignty assigned to rulers by the reserved and inalienable rights of the original sovereign people, and so *vis-à-vis* the rulers the collectivity of the ruled appears as the real state personality. Though Bodin by his unconditional rejection of both limited and divided sovereignty arrived at the conception of a ruler personality which conceptionally absorbed the state, even he did not bring himself to take the final steps. As he believed in an original sovereignty of the people he allowed the people, after the sovereignty had been surrendered, to retain at any rate its ownership of the state property, and so in this regard put the *respublica*, as the actual holder of rights, in antithesis to the *imperium*.

According to Gierke, Hobbes at last reached the ultimate goal by his skilful overthrow of what had hitherto been the whole political structure of the law of nature. To Hobbes there was no *societas civilis* and no treaty-based relationship between ruler and people. There is an intellectually perceptible "ruler personality"; in it, and only in it, does the whole state acquire a personality. For, as Gierke said, "all the unity of this artificial body

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, p. 307. Ibid., I, p. 576.

is based on the agreement, which by virtue of an inevitable command of natural law takes the form of a state compact, that authority, will and action of *unus homo vel unus coetus* vested with the rule shall rank as the authority, will and action of all the individual subjects." So the ruler appears as *persona representiva*; his person is the person of all the citizens. There can be only one personality of the state, as of the human body; the ruler is not a head but the spirit of this giant body and alone represents its personality. Gierke assumed that it is in this way that out of the artificial life of the great automaton (*homo artificialis*) there arises an artificial person (*persona artificialis*), which under the technical name of the *persona civitatis* forms the central point of state law. This was the way in which Hobbes, starting from arbitrary postulates, had with inexorable logic solved the problem and deduced from the individualism of natural law the unitary state personality. In this material-mechanical conclusion the natural law theory of the state elevated the holder of state power to the rank of an earthly god (*deus mortalis*) and seemed to have come to the end of its development. But it did in fact develop still farther, and the most fruitful part of it was the conception reached by Hobbes, though it was purely external and formal, of the unitary state personality.[1] In contrast to this development of state absolutism and concentration there developed inside the theory of the law of nature a federalist theory which in logical elaboration of the doctrine of the social contract furnished smaller unions with the same natural law basis as the state, and therefore assigned to them even in the state an independent collective sphere of their own.[2]

In the seventeenth century the way for this had been prepared particularly by the theory of Hubert Languet that "the provinces and towns are appointed to be guardians of the union of the nation with God and of union between rulers and people, and are therefore entitled and bound to resist in arms a ruler who breaks the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, pp. 331–332.
[2] Ibid., p. 344.

compact and in the last resort to free themselves from him."[1]

But the chief contribution to natural law federalism was without doubt made by Althusius, of whom Gierke was the chief exponent. In the elaborate parallel which Althusius drew between unions of every grade the theory of corporation and the theory of the state appear only as elements of one single unitary theory of society. Althusius' contribution to the corporation theory was to give to the less comprehensive unions a natural law basis, to give them the same origin as, and kinship with, the state, and make them appear "not as artificial creations but as living members of the highest collectivity."[2]

Hobbes' conception of the atomistic mechanical structure of *systemata subordinata* has, despite its weaknesses, an historical importance, because it introduced for the first time the conception of the union person, and made it the central idea of both corporation law and state law.[3] Besold and Hugo's fight against Pufendorf is as outstanding a polemic in German history as is that of Hobbes and Locke in England.[4]

Gierke pointed out that in the theory of the law of nature the individual was sovereign; men were originally free and wholly independent of one another. But then arose the question as to how this was compatible with the basic assumption of the theory that even then law was operative. The answer to that question was "of decisive importance not only to the idea of the primitive relation, but to the interpretation of the existing universe." The view came more and more to prevail that after the establishment of a civic system the actual holders of sovereignty remained as such in the same "state of nature" as previously the individuals had been—the sovereign states were therefore represented as "moral persons" continuing in the state of nature and subject to the pure law of nature as an international law.[5]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, p. 345.

[2] Ibid., p. 350. Cf. my *Problem of Federalism*, II, pp. 1073–1075. Gierke. *Johannes Althusius*, Ch. X.

[3] Gierke, *Das deutsche Genossenschaftsrecht*, IV, p. 360.

[4] Ibid., p. 363.

[5] Ibid., p. 379.

Rousseau contended that "man was born equal but is in chains." Because of this omnipotence of the individual Fichte did not regard the law of nature as actual law; rather did the law become effective by means of the state's power, which on the other hand could not give to any law except that of reason the stamp of real law; "the state itself is the natural condition of mankind, and its laws ought to be simply the effective law of nature." Even Kant could not get away from the individualist standpoint. He based law, like morals, on the "categorical imperative" derived from an *a priori* law of thought; attributed, also *a priori*, to the state of nature the existence of the idea of a civil state; and postulated a compulsory legal obligation of membership of a collectivity of law.[1]

None of these doctrines was acceptable to Gierke. Similarly Locke's idea that property originated in individual work or possession in the pre-social condition of mankind, and so "property" as well as "liberty" were the inviolable products of the state of nature, and Fichte's socialistic system of the *Handelsstaat* failed to comply with Gierke's fundamental test of organic unity in plurality.[2]

In the strictly absolutist systems full effect was given to Hobbes' principle of representation—it was of the nature of the union personality that by virtue of the transference of the powers and wills of all a single ruler took as *persona repraesentativa* the place of each individual subject. But even so, Gierke argued, the principle of collectivity had to be invoked, though it was wanting in constitutional importance and had no place in monarchies. But it did appear in a supplementary role in republics and in every corporation which had any assembly playing the part of *persona repraesentativa*. For in those cases on the basis of the old distinction between *plures ut universi* and *plures ut singuli* and by introducing the theory of the legal equivalence of the *universi* to the *major pars* (i.e. of the majority principle), a collective personality

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, pp. 386–388.
[2] Ibid., p. 390. Fichte. *Geschlossener Handelsstaat*. 1800.

was set up. It is understandable, therefore, that in the case of Spinoza, who regarded democracy as the normal state form, this collective personality should have played a more important role than with the exponents of monarchical absolutism.[1] Pufendorf made an attempt to harmonise the conceptions of the collective and representative unity by putting every *societas*—state, church, community, corporation and family—in the category of the *persona moralis composita*. Unlike Hobbes, he assigned constitutional importance to the combination of individuals in a collectivity based on the capacity to will and act; but inasmuch as on this *Genossenschaft* basis a real person came into being, he followed Hobbes closely in desiring the subordination of the powers and wills of all to the power and will of a single man or a single assembly. That is to say, he aimed at the creation of a collective person which would be of the same genus as the individual person, and to do this by distinguishing between the legal conception of the person as *persona moralis* and the physical conception of the human personality.[2]

As to his contemporaries, from Wolff to Hert and Nettelbladt none had been able to go beyond Wilhelm von Humboldt's dictum that "each moral person or society can be regarded as nothing more than the union of all its members."[3] Gierke pointed out that Rousseau did indeed allow of the fusion at a particular time of the combined individual wills into a general will (*volonté générale*) which is not merely the will of all (*volonté de tous*). But all the dialectical devices which he used to demonstrate the "distinction between the general will and the will of all failed to change that general will into a true collective will."[4]

Gierke pointed out that with Rousseau the whole difference resolved itself into this—that the will of all is the sum of the individual wills inclusive of their concrete variations, whilst the general will is the sum of the

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, p. 414.
[2] Ibid., pp. 415–416. [3] Ibid., p. 432. [4] Ibid., p. 434.

concordant elements of the individual wills less their differences in detail. Therefore the dominance of the majority was not a consequence of the internal nature of the general will, but the result of the substitution of a voluntary agreement in place of the need for unanimity. The sovereign collective person immanent in the general will contract fused its existence by the legal device of social contract into the sum of the unitary individuals; in other words, "the sovereign moral person manifests itself completely and exclusively in the assembly of all."

Any representation of the sovereign collective entity is compatible with this conception. This moral person is bound up with the visible aggregation of individuals in such a way that the idea of an organ, by which the invisible life-unity of a body social is made actively manifest, cannot emerge.[1] This conception led Rousseau to imagine an artificial system by virtue of which "the sovereign moral person creates in the governmental body a second moral person with a derived and dependent but yet real life" to serve as a *corps intermédiaire* between the sovereign and members.[2] Rousseau had an overwhelming influence upon the natural law theory of personality. His doctrine was, however, modified even in France (e.g. by Sieyès), and in Germany it was only partly adopted by the supporters of ruler sovereignty. But Fichte, who conceived of each individual as "a participator in sovereignty" on the one hand and as a "free individual" on the other, thought that the state is "a unitary body," an effectively united whole. He thought that in the concluding of the union contract there emerged, *vis-à-vis* the all of individuals, an all which as a collectivity is not merely an imaginary but an actual whole, a totality, i.e. a *totum* united by that very fact, and not a *compositum*. This whole is the third party to the contract, and is completed by the fact that every individual contracts with it, promises to protect it, becomes part of it and combines with it."[3]

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, pp. 435. [2] Ibid., p. 436.
[3] Ibid., pp. 433–434. *Über die Geschichte des Majoritätsprinzips.* In *Schmoller's Jahrbuch*, 39. Jahrgang, Zweites Heft, p. 25.

This is a change from "plurality to unity" brought about by a process of abstraction, by which the union is directed to the protection not of this or that individual but to the protection of all. The whole thus formed cannot be a living unity, and Fichte in comparing it with an "organised" natural product envisaged the reciprocal relations of the parts and not the organic unity of the whole, without which, as Gierke pointed out, there cannot be a real person.

Fichte sometimes put at the side of the physical person a "mystical," "moral" or "juristic" person, but meant thereby really the relations of a combination of individuals; and did not apply to the state as a "whole" the category of "person."[1] Kant's metaphysical hypothesis also did not recognise any "real union personality," although he frequently used the term "moral person" for a "complex of individuals."[2] The purely mechanical individualistic theory of natural law never made anything more of the moral personality than a "formal conception." Thus the living state personality remained undiscovered, but on the contrary the super-individual *persona ficta* was more and more distinguished as a *persona moralis* of the natural law theory.

Gierke, however, found the way to a new conception of the majority principle as the historical organic expression of the German *Genossenschaft* idea. Abandoning the ideas of the institutional state and the corporation and the majority principle of Romanist and Canonist theory, he indicated the right direction, namely that given by the German *Genossenschaftstheorie*.

If human unions are social organisms and as independent living entities develop their nature beyond the nature of individuals, then in respect of law they are persons of a higher order than individual persons.[3] They are not to be understood in the sense of the natural law theory as artificial aggregations of individuals into

[1] Gierke. *Das deutsche Genossenschaftsrecht*, IV, pp. 438–439.
[2] Ibid., p. 441.
[3] Gierke. *Über die Geschichte des Majoritätsprinzips*, p. 26.

collective unities or according to the fiction theory as artificial individuals freed from the collectivity. To the *Genossenschaftstheorie* they are real collective persons, i.e. independent communities with an immanent life-unity, organic wholes, something more than the sums of their parts. Therefore not only the external but the internal life of the union persons is a subject-matter of the system of law. Legal rules govern not only the formation and membership of the union bodies, but also their organisation into a unitary whole and the relation of the parts to one another and the whole. So there arises the legal conception of "constitutional organs," that is, the members and groups of members entrusted with the conduct of particular groups of activities as the representatives of the union personalities. They are not representatives (i.e. agents) in the sense of the law of persons, but the visible tools of the invisible life-unity of the social body.

The existence in the union person of organs which are capable of will and action indicates the characteristic feature of the *Genossenschaft* system, in which the state and all the corporative unions appear as communities of will and action.

In this argument Gierke asserted that the collectivity of all members can give actuality to the unitary collective will only in so far as it is constitutionally called upon to act in its legally ordered assembly or in the special collective corporation as the will-organ of the union person.

Therefore the community as such is "something other than the sum of individuals belonging to it, and no device can free the unitary state and corporation will from the concordant individual wills."

Gierke explained that as members of the union the individual human beings can only in their organised coalescence present the living whole in its legal unity. So his argument is that the assembly is "simply an organ," and even if it embraces all the members and unanimity is required it is still only an organ of the union and is competent to formulate and declare the general

will only in the sphere of its constitutional authority. But similarly it is an organ if, in accordance with the life-system of the union, a majority decision is binding. Gierke laid down the proposition that "the validity of the majority decision as one of the constitutional means of securing unitary action of the assembly is merely a part of the legally established system of organs."[1] It is an element of the organisation of a consolidated organ. Therefore the majority principle, unlike that of the natural right theory, has not an absolute validity based on the nature of human association but has only an historically conditioned relative value.

In this respect the dominance of the majority has never given the stamp of a living union personality to any union, and least of all to the state; there has always been need for an organ alongside the assembly that decides by a majority. In so far as in a monarchical constitution a union head is made the supreme organ, it is obvious that no assembly majority can produce of itself alone the unitary collective will. Discussing misconceptions as to democratic constitutional majority rule, Gierke pointed out that in every social organism the majority principle is by virtue of the constitutional division of functions supplemented by the authoritarian principle. Consequently in the larger unions there are inevitably representative institutions, by virtue of which, instead of the whole body of members entitled to vote, which is normally restricted to voting at elections, smaller assemblies or boards are set up to form the general will, these being, in the organic theory, not plenipotentiaries of the whole body, but direct organs of will of the community. If the majority principle applies to their decisions, it cannot possibly mean more than a principle of organisation for a part of the collective organism. Anything which enables a minority to stop effect being given to the majority decision is irrational, if the majority principle is regarded as deducible from the nature of the unions. The *Genossenschaft* way of thinking finds a means of justifying the minority right by the full

[1] Gierke. *Über die Geschichte des Majoritätsprinzips*, p. 27.

recognition which it accords to free individuals and group-personalities in the collective organism. In this respect Gierke's conclusion is that from the historical organic standpoint the majority principle is a factor of great importance for the formation of unions, but has not in itself the capacity to create living bodies social. Its sphere of validity can have only an historical and not a purely rational basis, and its value cannot be determined absolutely but only according to the way it operates in the organic life of the community.[1]

Gierke's idea of the state is far more explicitly set out in his later address, *Der germanische Staatsgedanke*, in 1919, though allowance must certainly be made for his conservative attitude of mind towards the Germanic state in the unparalleled condition of Germany immediately after the Great War, when the November Revolution of 1918 had changed the German Empire into a Federal Republic, and the question seemed to him to be whether the newly constituted state was to be based on Germanic or on some alien ideas. As to that Gierke had no doubt. He asserted that it was Germanism (or better Teutonism) which, after the downfall of the ancient world, had created the mediaeval world and the modern world of to-day; and declared that "we Germans are the central nation of Teutonism"—the original stock, as Fichte had recalled at the time of the nation's greatest need.

Considering the history and nature of the Germanic state, Gierke held that it had been, and was still, based fundamentally on *Genossenschaft* and functionally on *Herrschaft*; in modern terminology it can be called partly a "democratic state" and partly an "authoritarian state."[2] That whole Germanic state nature, he concluded from an elaborate historical survey, had as its ideal nothing beyond the stage which had been reached in the German Empire in 1914. Gierke's attitude was as real a manifestation of conservatism as Edmund Burke gave to England when he struggled against the rising influence

[1] Gierke. *Über die Geschichte des Majoritätsprinzips*, p. 29.
[2] Gierke. *Der germanische Staatsgedanke*. Berlin, 1919, p. 7.

of the French Revolution. But as Bernard Shaw said, "history is not always the same." And there is no doubt that stability of authority can be secured in the democratic state and even in republics.

Gierke believed that in the early Germanic state the army and justice were the two great institutions in which the unity of the people was manifested. Therefore he assumed that the reconciliation of popular freedom with a dominant power was the characteristic feature of the German idea of the state which had grown and developed along the line of the transformation of absolute monarchy into a constitutional monarchy and of the reconciliation of an historically inherited *Obrigkeit* with the popular basis of the *Genossenschaft* community.[1]

It had broken with the rationalism of the law of nature, shattered the imaginative structure of individualistic theories of contract, dispelled the misty dreams of world citizenship, and put in their place the historical-organic understanding of state and law.

He formulated the Germanic idea of the state by saying that it conceives the state as "the actual product of a world-historical process, which may be built up by voluntary human action but cannot without loss be taken away from its natural basis." He added that German thought saw in the state, as the living embodiment of the spirit of the people, an organic structure, a spiritual-ethical living being of the highest order, a united whole which has its own purpose of existence and reveals itself in its heads and members at any time as immanent collective personality.[2]

His ideal state is the materialisation of this conception of spiritual ethical organism in which the parts and the whole are harmoniously interrelated, are independent each in its own sphere, and co-operate with one another in the common whole. He claimed that both in structure and spirit the Empire of 1871–1918 was thoroughly Germanic. It was so as a federal state, which was active as a "vital collective force" in harmony with the individual

[1] Gierke. *Der germanische Staatsgedanke*, p. 22. [2] Ibid., p. 23.

force of the individual life of its member states which were the result of historical processes; as a constitutional state which maintained a balance between inherited monarchical powers and the popular organs of the state; and as a cultural state which had set an example of care for the development of its people and the solution of social-political problems. It was wholly Germanic, as a *Genossenschaft* state in which "the one-sidedness of a professional bureaucracy, which the world envied us, was offset by an immeasurably elaborate system of civil, communal and corporative self-government; and as a legal state which more and more secured the safeguarding of the public law by the judicial system of independent tribunals."

His conception of the state was, however, confined to the constitutional monarchy; and in order to resist the natural development towards a democratic decentralised republic he would have had wholly to abandon the *Genossenschaftstheorie* which he had spent all his life in developing.

§ 4

Thus Gierke upholds the *Genossenschaftstheorie* as the basic criterion of the nature and functions of the state. Nevertheless he was never disposed to recognise a state in the mediaeval community which the *Genossenschaft* and *Herrschaft* conception began to mingle and blend into the state conception. The ideal state of the *Genossenschaftstheorie* is indicated by his statement that "the state itself is for us an organisation of the collective nation—rulers and ruled—for political and juristic unity."[1]

The transformation of the *Genossenschaft* into the corporation idea in the course of development of the *Genossenschaftstheorie* has meant the more distinct manifestation of the collective personality of the state in contrast to the personalities of human individuals. The organ subordination is conceived as numerous grades of

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, p. 576.

organisms—i.e. the conception of species—in the relative relationship of the individual or group personalities of the narrower and the higher organisms. The collective will is simply the organic synthesis of individual wills in relationships of collective and individual co-ordination, and the relative subordination of the individual will to the collective will. Organic relationship between the whole and the parts is Gierke's highest aim, that is, the *Zusammengehörigheit* of unity and plurality.

The organic unity of a plurality of organisms is not a mechanical-atomistic synthesis but has an ethical basis in the organic collective personality, not solely in the highest unity, as Neo-Kantians contended, but in all grades of personality, from the individual to the highest personality of the state, within their respective spheres.

The organic theory which he applies is not the microcosm of the organic structure of being, as Bluntschli and his followers held on the principle of the natural law, but the co-ordination and subordination of a number of organisms, and of lower and higher organisms. Gierke's fundamental *Genossenschaftstheorie* is based not in any way on absolute validity but on relativity. His whole system is federalist rather than unitarist. But since the idea of the state evolved in the antique-modern conception of absolutism, in the fiction theory of the mediaeval Roman and Canonist ideas, and later in the individualist conceptions of natural law and of the social contract, the element of institution became pre-eminent in the formation of the state structure. In these circumstances the legal validity of the corporation element of the state is, to a certain extent, confined to internal relations and does not extend to external legal relations.

Gierke, however, assumed the state, as the highest corporation of mankind, to be of the same nature as other communities—commune, district, province—the main difference between the state and other state-like communities being due to the fact that the state is the sovereign community, though the others have equally collective personality wills with their own ethical validity.

The highest attainment of legal speculation as to the institutional elements in the state is undoubtedly the conception of sovereignty and the theory of fiction, based on the individualist natural law and, juristically, on positivist formalism. Therefore not only Gierke himself, but also his followers, are bound to assume for the modern state structure that it is fundamentally based on corporation elements, but for external—legal as well as political—purposes has institutional elements. The principle of unity in plurality in the state on the basis of the *Genossenschaftstheorie* is visualised as an inner organic relationship of will and action between the corporations in the state and the state, with a right of supervision vested in the state.

Especially do Gierke's political sentiments jeopardise to a large extent the ultimate development of state theory on the lines of the *Genossenschaftstheorie*. His highest political ideal of state structure is the harmonious union of the democratic and monarchical state on the basis of the national spirit. His appeal to Fichte's national conservatism indicates his ideal of the German state of the future.

Though his fundamental system of *Genossenschaftstheorie* pointed the way beyond the hitherto predominant power of the sovereign state theory, at least to Preuss's democracy, his nationalist sentiment and his patriotic attitude towards the monarchical constitutional state are great hindrances to the progress of his theory.

Gierke admitted the need for the reconstruction of international law, and was a firm adherent of the principle that the international legal community should be based on the *Genossenschaft* relationship of sovereign states. In this respect he stands somewhat behind some of his followers, such as Hugo Preuss and Karl Wolzendorff. But in respect of sovereignty Preuss can *de facto* replace it by the conception of territorial supremacy, and Wolzendorff, like Carl Schmitt, defines it as the final authority of determination.

Even Harold J. Laski in England, a distinguished

champion of the pluralist movement, though he theoretically substitutes relativity for absolutism and insists on the consequent denial of the absolute conception of sovereignty, can hardly get away from the sovereignty hypothesis of the modern state, for to him the modern state is "the territorial community in the name of which some agent or agents exercise sovereignty; by sovereignty is meant the legal competence to issue orders without a need to refer to a higher authority."

In the strict sense of present international law, based on the individualist law doctrine of contract, the League of Nations, even with the ratification of the Optional Clause in the Covenant of the League, can hardly bring the member states within the scope of a higher international sovereignty, unless the international law is given a public law basis. Gierke did, however, predict this necessary transformation of international law.

But I must point out in this place that no matter how far he may have failed to advance the theory of the state beyond that which prevailed in 1871, his contribution of the *Genossenschaftstheorie* is undoubtedly a guide to the future reconstruction of the theory of the state into a theory from which the conception of sovereignty and the theory of legal fiction will be eliminated, and the pragmatic approach to the state theory can be made on a new basis of political and legal, as well as of philosophical, theory.

CHAPTER V

CRITIQUE

Is this honoured master, Otto von Gierke, a pluralist or a unitarist? An English writer said: "His organic theory, the result of an abstract dialectic, really supports the state absolutism. . . . Hence the polished Hegelian system." Some German jurists remarked that Gierke's system of law is based on unitarism.

The criticism of principles or theories of the social sciences must be directed to the scientific analysis of what and how much they have in common, how much they differ, how far one is more advanced than another, and what is the crucial point to which each is directed. No theory of social science, either legal, political, economic or philosophical, can be outside the two contrasting conceptions: *a priorism* and *a posteriorism*, idealism and empiricism, formalism and realism, rationalism and pragmatism, utilitarianism and metaphysical philosophy, pluralism and monism. Many thinkers are hesitating between these two poles and attempt to make use of both the two contrasting conceptions by blending them into a harmonious system; but even so in all their systems there is a bias in one or other direction.

To Gierke the highest purpose is that of bringing about the "harmonious agreement of unity and plurality, which is the final goal by which we measure the ethical justification of both general and individual purposes"—that is, the organic interdependence of plurality and unity.[1] Hegel's synthesis, employing the dialectic method of logic, was the absorption of individuality in the "spiritual," "absolute" and "ethical" whole. The metaphysical approach to the philosophical theory of the state, no matter on what lines its construction may proceed,

[1] Gierke. *Das deutsche Genossenschaftsrecht*, I, pp. 1–2. Ibid., II, p. 42. Ibid., III, pp. 186–664. *Die Genossenschaftstheorie*, pp. 74–338. Cf. my *Problem of Federalism*, II, pp. 670–671.

shows the manifestation of the sovereign whole, i.e. the "spiritual entity," for which the Hegelian school of thought alone furnished an abstract justification of "actualisation of freedom." Hegel's notion of state as organism is the objective validity of self-contained state activities representing the political constitution.[1] Whilst Gierke concentrated his efforts on showing that the corporate personalities of the lower or narrower unions are as real as those of the higher ones, Hegel had no conception of the ethical or juristic validity of the parts in the spiritual whole. The mistake as to an analogy between Hegel's and Gierke's theory of organism was an easy one to make, since the dialectic philosophy of Hegel, though he was "not a final philosopher," has a mystic power of drawing all his disciples into his own mental sphere of the philosophical imperative. When William James introduced an unknown American writer, Blood, as an exponent of pluralistic mysticism his phrase—"in Hegel's mind the vortex was at its liveliest, and anyone who has dipped into Hegel will recognise Mr. Blood to be of the same tribe"—is the expression of the error into which many monistic or other critics fall.[2]

I will not discuss in this place Gierke's method of approach to the ethical-spiritual organism, but only point out that his aim is unity in plurality, not plurality in unity. Pragmatic pluralism, to which distributive but not collective unity is an end, runs counter to Gierke's organic whole, for the end which Gierke sought to serve is collective unity within distributive plurality. Therefore Gierke's *Genossenschaft* system is not at all the polished Hegelian system but polished pluralistic legalism. For instance, however much Leninism and Machiavellianism may both in their application to policy be based on a mere utilitarianism, yet the aim which Lenin claimed to serve is far higher and has a more legitimate ethical value

[1] Hegel. *Philosophy of Law.* Trans. by S. W. Dyde. London 1896, pp. 240, 244, 255, 257.

[2] William James. *Pluralistic Mystic.* In: *Memories and Studies.* London, 1911, pp. 376–377.

than that of Machiavelli, who simply advises the prince how to rule. The purpose of Leninism, in its first development, was a proletariat dictatorship against the counter-revolution; its approach to the utilitarian policy is somewhat analogous to that of Machiavellian absolutism, but the principle and aim is far more advanced and progressive. It must therefore be admitted that the common element for which we are seeking in the elaborated theories and their practical application has only a partial validity, and in interpreting the theories account must be taken of the intrinsic value of the underlying principles. From the realist point of view theoretical similarity is not the main criterion for the comparison of two contrasting theories. That is to say, the theories must be considered in relation to the social conditions of the times and places at which they were formulated.

Gierke's conception of the state as a sovereign corporation community—i.e. as the highest human association in the stage of organic development, with a supreme authority having no superior, is partly the outcome of his philosophy of history and partly the reflection of the nationalist temperament of his generation. The *Genossenschaftstheorie* which he formulated is a product of the social science of 1880. Although he was entirely opposed to the positivist dogma, to the natural law theory of sovereignty and to the Romanist fictitious personality, yet his whole method —that of the development of sound theory from the examination of actuality—made it impossible for him to deny to legal sovereignty a place in the structure of the state. On the other hand, the possession by the state of the right of supervision does not mean that the corporation in the state is in a position of complete subjection to the sovereign state. Whilst Gierke, as shown throughout his numerous writings, undoubtedly regarded sovereignty as the essential attribute of supreme territorial authority, he was apparently indifferent to the quality of indivisibility, which was the crux of the matter in the view of many contemporary publicists.

In his discussion of the new German Empire of 1871 Gierke assumed that it was a "federal state," which he defined as being "a consolidated political organism in which the state sphere is divided between the collective state representing the whole and the individual states forming the members in such a way that the organic fusion of both factors gives the whole a state nature."[1] If the members were not states, it was not a federal state but a unitary state with self-governing bodies; and conversely if the whole was not a state but only a unit of international law, it was merely a confederation. But the new Empire was, he held, undoubtedly an actual federal state, because in it on the one hand the individual states had not given up their state nature, and on the other hand, by virtue of the voluntary compact abiding in perpetuity, they had set up the collective state with a state nature of a higher order than their own.

He claimed that the new Empire resembled the old in being a constitutional state based on, and recognising, the supremacy of, law, though the new surpassed the old in that it aimed at being also a cultural state; but in all respects the new structure was "a logical product of history with the force of natural power."[2] To him the position of Prussia in the Empire was not one of hegemony, as Triepel conceived it; Prussia was not in the smallest degree antithetic to the German collective state but was its soul and the core—in the central life principle of the wider organism grafted upon it. The highest competence was vested in the *Kaiser*, under whom the individual states appeared as members of the *Reich*. They occupied a dual position; in their domestic matters within the individual state spheres they were self-contained entities, whilst for important matters within the sphere of the Empire they were members of and participants in the collective organism of the federal state. In this latter relation they were represented by "the holders of their highest state power—the monarchies by the princes, the

[1] Gierke. *Das alte und das neue deutsche Reich.* Berlin, 1874, pp. 16–17.
[2] Ibid., p. 21.

free towns by the senates, whilst the constitutional limitation of their powers *vis-à-vis* the Empire appeared to be a matter of the inner constitutional law of the individual states." This expression indicates Gierke's assumption as to the position of the highest authority—sovereignty—in relation to the narrower organisms; it is on the lines of Waitz's theory of divided sovereignty. But unfortunately Gierke made no concession in respect of a higher international community by assuming that the sovereign state is under a supreme international organism.

His opponents might draw an argument from the internal structure of the *Genossenschaftstheorie* in comparison with the Neo-Kantian method of relation to internality and externality of will and in relation to the transformation of psychological realism to a biological hypothesis. In the first place his system of law and the application of the theory of organism in his whole system of the *Genossenschaftstheorie* are contrary to the dialectic approach to the organic whole, but not entirely so to the modern sociological theory of conflict of interests. His system of law admits the co-existence and co-ordination of private and public law—i.e. individual and social law—in their own independent spheres, and at the same time allows for a sphere of interdependence of individual and social law, i.e. that of mixed *Mitgliedschaftliche Sonderrechtsverhältnisse*.[1]

The relation between law and ethics provided for the federal demarcation of that sphere of activities in which the reciprocity of law and ethics is according to him its synthesis of spiritual and ethical organism. In the system of law his main purpose is to put private and public law on the same level. This method of approach to the theory of the state is clearly indicated by his recognition of the state as the territorial corporation embodying institutional elements just like other communities—communes, provinces and self-administrative bodies. He emphasises the fact of the state having the nature of community.

[1] Gierke. *Privatrecht*, I. Leipzig, 1895, pp. 533–550. My *Problem of Federalism*, II, pp. 672–675.

Reciprocity, interdependence and relativity in the relationship of the various grades of the social structure is his main axiom, in which continuity of co-ordination and union between plurality and unity are based on the harmonious agreement of plurality with unity. His highest aim is, therefore, the creative coalescence of the general and individual wills in the ethical organism.

The interdependence of plurality and unity is unity in plurality. As he is primarily a German jurist, and secondarily a philosopher, the method of approach to his general system should naturally be formalistic, though he rejects this entirely. He cannot leave the matter of the corporate personality as "something which," as Maitland pointed out, "the contract theory cannot explain." He cannot leave the definition of personality in the same way as Maitland, the legalist, left it to the philosophers to define moral personality.

For the sake of argument I will describe L. T. Hobhouse's conception of organism from his social philosophical standpoint.

However unsatisfactory the terms we may use to express a form of unity which has "a collective character rather than a substantial unity," Hobhouse said, "we can speak of the soul of a people, meaning thereby certain fundamental characteristics of their psychology which we believe to be widespread and important in the shaping of their social behaviour," and "we speak of the 'spirit of the times' not inappropriately as a summary name for certain moral and intellectual tendencies."

According to him the rule of logic is simple; it is that "we must avoid importing into our defining term the associations belonging to it in another capacity." Only so will "the terms which we use to describe society have a less disturbing effect upon the progress of sociology" than has hitherto been the case. If we describe society as "organic," we must not regard it as "a great Leviathan, a whole related to individuals as a body to its cells." The organic must be regarded as "a genus into which animals and plants fall as species and society as another

species." "An organism," Hobhouse said, "is a whole constituted by the interconnection of parts which are themselves maintained each by the interconnection with the remainder. Its mutual determination is the organic character which any given structure may share in greater and less degree, a structure being organic in so far as this character prevails and otherwise inorganic. In its completeness the organic is an ideal. But actual societies have a touch of the organic character, some more and some less." And he continued: "It is on this character that social ethics depend; it is through this character that societies, like biological organisms, maintain their plastic adaptability, their power of adjustment to new circumstances, of repairing injuries, of resilience to strokes of fortune. It is by reference to this character that their development is to be measured."[1]

The organic character of society presupposes democracy in its basis. If otherwise, this principle is "set at nought" firstly "when society is so resolved into individuals that the character of the life which they share is left out of account," and secondly "when its life is regarded as other than that which its members live in their dealings with one another."

Hobhouse's remarkable dictum: "The happiness and misery of society is the happiness and misery of human beings heightened or deepened by its sense of common possession. Its will is their wills in the conjoint result. Its conscience is an expression of what is noble or ignoble in them when the balance is struck"—is the basis of the organic theory in which "there is no common self submerging the soul of men." Without a form in which all can share consciously, and in which happiness is experienced by individual men and women, there is no greatest happiness of the greatest number. Real happiness is only evolved in societies as organisms in which men's distinct and separate personalities may develop in harmony and contribute to a collective achievement.[2]

[1] L. T. Hobhouse. *The Metaphysical Theory of the State.* London, 1921, pp. 132–133.

[2] Ibid., p. 133.

So Hobhouse described the theory of organism and pointed out the defects of the organic theory of society. Firstly, differing from the criticisms which Kelsen and Sander have directed against Gierke's doctrines, Hobhouse's main objection to the organic theory was the result of his philosophical approach to reality as "a whole of elements each conditioning and conditioned by the others." The conclusion reached by Hobhouse as to the nature of this interrelation within the whole was that "of the three types of system revealed in experience—the mechanical, the organic and the teleological—the mechanical and the teleological are distinct, while the organic is not *sui generis* but may be explained in terms of mechanism qualified by teleological factors."

According to Hobhouse "a whole acts mechanically when its parts act uniformly as a result of forces immediately impinging on each of them, and in a manner which is in principle indifferent to the results of their action or to the state of the other parts"; it acts organically when the operation of the parts "is varied in accordance with the requirements of the whole as a self-determining structure"; it acts teleologically "when its acts are determined by their own tendency to produce results affecting the whole." The teleological differs then sharply from the mechanical; it has more in common with the organic.[1]

Although Hobhouse admits the organic interdependence and relative correlation between the parts themselves and the whole, his essential disagreement with the

[1] "For if the end of the series be included within the series we may regard means and ends as mutually necessitating one another, and so to stand in organic relation. Yet in definition the teleological differs from the organic. The differentia of the latter is mutual conditioning, of the former, determination by relation to ends. The phrase 'determination by relation to ends' . . . means rather, determination by an effort referent to the outcome as it emerges from the given situation and the effort, whatever it may be. The reference is explicit in conscious purpose, but below there are, as we have seen, several grades of conational adjustment implying sustained and varied effort and explicable only in terms of a felt want or disturbance of varying explicitness directing action until relief is attained."—J. A. Hobson and M. Ginsberg, *L. T. Hobhouse*, 1931, pp. 234–235.

organic theory is due to the fact that the mere interrelationship and reciprocal correlation cannot sufficiently interpret the actual reality of development from the parts to the whole. The teleological purposes and ends are the forces to focus the course of development in interdependence, co-ordination and subordination between the parts and the whole within the reality of the world.

So he said: "It is itself an aspect of, or element in, reality—just that aspect in which all elements are correlated. It is, in fact, the principle of interconnection among elements, each with tendencies of its own, by which it is strictly conditioned. Abstract this relation and we have the reverse aspect, under which each element acts in indifference to the remainder. In the concrete both aspects, the teleological and mechanical, are presented and their interweaving is the fundamental characteristic of reality."[1]

As Hobhouse's theory of harmony in its application to organism is purely English in character, whilst Gierke's theory of organism is purely Germanic in structure and nature, the theories of organism of these two thinkers do not proceed on the same lines. Though Gierke desired more than any other German writer to base the social structure on the pure *Genossenschaft* conception, yet his juristic temper prevented him from being entirely independent of the legal background of his time. Though William James as a philosopher disagreed entirely with the monistic conception and required society to be distributive and not collective, the principle for which he strove was the manifestation of the harmonious adjustment of plurality and unity in their highest synthesis of relativity and interdependence in all human organisations and institutions. I must emphasise the fact that the aims and methods of Gierke's *Genossenschaftstheorie* are pluralistic in essence, juristic in character, rationalistic in philosophy, and not unitarist, sociological and pragmatic.

Next, as to Gierke's idea of the relation of the general

[1] L. T. Hobhouse. *The Philosophy of Development*. In: *Contemporary British Philosophy*. Ed. by J. H. Muirhead, p. 182.

will to the individual will. According to Ginsberg, the minor associations within the state possess the "real" or general will, but there have not been "many attempts at a really systematic analysis" of this assertion.[1] It is to a certain extent true from the sociological point of view that Gierke's idea of the general will inherent in the association resembles neither the general will of Rousseau or Hegel, nor very exactly the group will of Macdougall, nor Wundt's *Stufenfolge von Willenseinheiten*.

Gierke's *Gesammtwille* has by no means the same philosophical basis as the natural right theory and Hegelian dialectic. On his legal argument the application of the will theory to the conception of personality makes his theory complex, and this is the weakness of his system. For the justification of the collective personality as the highest realisation Gierke attributes legal capability of will and action to the collective personality in order to give a specific independent power of will in a collective personality either to the individual or higher collective personalities. For the sake of the attribution of reality to the collective personality the theory of will is applied to that personality. Gierke's theory of will, therefore, is his theoretical utilisation for the recognition of the collective validity of personality, i.e. the reality of personality. Rousseau's discussion did not appeal to him, as he remarked that the *volonté générale* is no more than *volonté de tous*.

The only conceivable unity of will, according to him, is, however, the height of the patriotic sentiment which is the synthesis of the spirit of community with all elemental wills of individuals, such as was experienced by Gierke when he stood in Unter den Linden on July 15, 1870, seeing the march of the German troops.[2]

This attitude represents nothing but the doctrine of sentiment, which is "a group of emotions clustering round an object, a complex disposition or tendency to experience

[1] M. Ginsberg. *The Psychology of Society*. London, 1924, p. 70.
[2] Gierke. *Das Wesen der menschlichen Verbände*, p. 29.

a large number of different emotions in regard to that object on different occasions."

So far as the theory of will is concerned, Gierke's attempt to find "a social living unity" in the legally organised whole, to be recognised as a union personality, is nothing but the legal justification of law, that law is concerned with the process of will in all stages from the first impulse to reasons for the final decision and its transformation into action.

Gierke's mind, however, was not ready to accept modern social psychology, but on the contrary he confined himself strictly to rationalist theorists with an orientation entirely divergent from the new social philosophy of our time.

Gierke vaguely admitted what Ginsberg says: "If we really could remove from will every kind of impulse-feeling, it would have no content whatever and would rule in an empty house. In truth, however, it is just as mistaken to separate impulse from will as it is to separate too sharply sense from thought." Reciprocity and inter-dependence between impulse or sentiment and will or self-consciousness is so far Gierke's attitude towards will. As long as Gierke admits the reality of personality as a "real living spiritual unity of human association," it would be possible to explain his idea of will through the avenue of social psychology as being "not a mere idea with no conative energy, but the whole unity or synthesis of our conative nature." That is to say, "it is essentially a principle of integration, working within and through complex systems of conative-affective interests, and its energy is the energy of our whole personality." In will, therefore, conation and cognition are very closely linked.[1]

In the discussion of the instinct and will and reason of the individual as contrasted with the corporate instinct, will and reason of society, the clear critical mind of Ginsberg reached the conclusion that "it is obvious that our view as to the place of reason, will and purpose in society is bound, in a long run, to be affected by the

[1] Ginsberg. *The Psychology of Society*, pp. 36–40.

conclusion we arrive at in regard to the nature of the social mind and the kindred problem of the kind of unity that belongs to social aggregates."[1]

Gierke, however, reached neither *de facto* this stage of social psychology nor Wundt's skilful system "with its conception of reality as a series of will-unities (*Stufenfolge von Willenseinheiten*), which through mutual determination, or reciprocal action, viz. presentative activity, develop into a series of will-complexes of various extent."[2]

But the flexibility of his attitude towards the theoretical formation to which the *Genossenschaftstheorie* is destined to develop leaves room for the utilisation by his followers of Wundt's theory of will or Durkheim's theory of the social mind, "based on a distinction between what he calls individual representations and collective representations," instead of his own Kantian method, in order to bring about the completion of the *Genossenschaftstheorie*, which as he left it is defective from the standpoint of modern philosophy.

But Gierke's theory of will on the other hand is the partial acceptance of the will theory of the German legal science as it existed in the Kantian system, with an attempt to link up with the biological theory of organism for the justification of the interdependence of unity and plurality.

This transformation of the psychological reality into the biological theory of organism in his system and method is his main weakness.[3] Jellinek's and Kelsen's criticisms of him are due to this very point.[4] As Preuss points out, the *Genossenschaftstheorie* is "Darwinism in jurisprudence." To modern sociologists or psychologists Gierke's *Genossenschaftstheorie* is open to much criticism.

[1] Ginsberg. *The Psychology of Society*, p. 45.

[2] Ibid., p. 76. Would Gierke's legal mind have been affected by Wundt's ethical ideas from the psychological standpoint? I think it is very doubtful, as he was a rationalist. Wundt's main work, the *System der Philosophie*, was not published until 1889, after Gierke had fully elaborated his own theory. Wilhelm Wundt. *System der Philosophie*. Leipzig, 1889, pp. 413–418, 591–615.

[3] Cf. my *Problem of Federalism*, 1931, Conclusion, pp. 1086–1089.

[4] Ibid., pp. 830–832, 967–975.

Even to the pragmatic system of philosophy Gierke's rationalist attitude is an entire repudiation of empiricism.[1] But as a jurist Gierke's attitude towards the dogmatic doctrine of jurisprudence was undoubtedly a decisive blow for the elimination of the existing hypothesis and the paradox from which political theory has suffered. In the realm of the predominance of natural right contract theory, of positivist formalism and of metaphysical legal doctrine the new idea of the relative validity of the legal science in jurisprudence leads through the medium of the reality of historical and actual facts and with the aid of the sciences in general—even of philosophy—to the justification of "unity in plurality" in the social structure.

In Germany, Hugo Preuss was undoubtedly a true apostle of Gierke's *Genossenschaftstheorie*. The *Genossenschaftstheorie* aimed essentially at the harmony between plurality rights and unity right. In this respect Gierke's work foreshadowed but never reached the democratic idea of Preuss, who advances the *Genossenschaftstheorie* to the stage of quasi-political pluralism. Preuss also was a jurist, but his method of approach to the state theory was far less juristic and nearer to the sociological school than that of any other German writer. Though Gierke as a conservative refuted socialism and denounced the social democrats as a "dangerous party," yet Preuss, though "not socialist," accepted the principle of socialisation as having a real "certainty," since it "is an indefeasible fact."

Gierke firmly adhered to the monarchical constitutional state, whereas Preuss was a strong advocate of republicanism, holding that democracy, and social democracy, must find a "common body" of work as long as the latter develops "on the basis of political democracy and not of dictatorship."[2] Although Preuss himself was dubious both in his theory and his practical attitude towards international law, yet he was prepared to admit the international community above the state. The flat denial of

[1] Pragmatism was to him a merely empirical theory and not what we call now pragmatism or humanism.

[2] Hugo Preuss. *Staat, Recht und Freiheit*. Tübingen, 1926, p. 427.

sovereignty as an essential characteristic of the state, although he substitutes territorial supremacy as the characteristic of the state in contrast with any other community, is undoubtedly an advance which the *Genossenschaftstheorie* ought properly to make. On this point Gierke's attitude, perhaps inevitable, is due to the fact that, although he assumed the basis of the state to be the same as that of other communities and denied the Romanist and natural right theories, yet his conception of the state, especially his theoretical justification of the modern state, clings to sovereignty as its particular characteristic.

If there is no truth in the theory of fiction in the formation of human association, sovereignty as an essential element of the state is "idolatry," just as much as the Roman or mediaeval Canonist theory of fiction. According to the juristic interpretation of the modern state, a legal imperative must be vested in the state in order to fulfil the purpose of its existence. Sovereignty is not an essential characteristic, or criterion of the state, but a certain "legal imperative" is necessary to enable it to carry out its service as final umpire in the disputes between the interests of the component parts. Criticism of this kind must be discounted by the existing legal status of the state, as Gierke tests the validity of his theory by the medium of historical and actual realisation. Antagonistic as he is towards positivist formalism and the fiction theory, he fails to weigh the balance of the element of corporation with that of institution in the modern state. But neither this nor his general disagreement with the democratic state, due to his overestimate of the value of bureaucracy to a responsible executive, can make Gierke's political ideas wholly unsuited to the future development of pluralism.

Gierke laid down the fundamental lines on which the *Genossenschaftstheorie* should be developed, but he stopped at the very point at which the theory should analyse the precedent hypothesis and dogma. The ultimate development of his theory was left to Preuss, who developed it

into democratic republicanism, imbued with the socialistic conception of equality of social factors.

Preuss's method of approach to the formation of a community and a state is purely realistic, repudiating all historical dogma including the principle of sovereignty. And so far as the *Genossenschaftstheorie* is concerned, especially as to personality and organism, Preuss hardly made any fundamental advance on Gierke's doctrines.

Nevertheless he attempted to criticise social conditions from sociological points of view rather than from Gierke's philosophical standpoint.

Walther Rathenau, an indirect follower of Gierke's pluralistic conception, declared in his pamphlet *Der neue Staat*, published in 1919, that the modern state as an imperialist state had its greatest and final period during the war of 1914–1918; thereafter "the League of Nations takes away a part of the military sovereignty, the social revolution of the world does the rest." Sovereignty would in the course of this century become a collective conception; the purely political idea of the state had forfeited its supremacy; there was room for a new creation.[1]

Rathenau observed that every one of us is a nodal point of innumerable "self-governing bodies, corporations, unions, associations and societies, of which the network becomes closer every day." Many of the threads which run through national and local, professional and trading, social, moral and religious life lead back to the centre of the political state—that is, to a political nerve-centre which, whether monarchical, republican, feudal, plutocratic or democratic, has always been the same from the time of the "political" state existing primarily for war, defence and power. These political things, Rathenau thought, would never wholly cease, but would lose—had in fact already lost—their pre-eminence.

The goal of socialism, Rathenau asserted, is the abolition of the proletarian condition, with the cessation of the follies of production and irresponsibility of consumption. The political object—the abolition of the

[1] Walther Rathenau. *Der neue Staat*. Berlin, 1919, p. 11.

proletarian condition—can be attained by a suitable policy in regard to property (including a limitation of the right of inheritance) and education; but in order that these may be "a complete and genuine democratisation of the state" it is necessary that "every group of its population shall secure a due share of influence, that every legitimate peculiarity of a people shall find expression in the state organisation, that every available spirit shall secure an appropriate method of service." But in the "class" state the popular will had never been thus embodied and made manifest.

Rathenau held that in this new age the state was "no longer a mere state." From the will community of the nation, from the political, military, religious, legal community it had developed into the cultural community, the educational community, the trade community and finally into the economic community."[1] But there was one fundamental defect—the assumption that the administration of the state, in all its ramifications, could be efficiently directed by a single head (monarch or premier) supervised by an omniscient parliament. In Rathenau's judgment, a parliament divided by political or religious creeds can divide "the powers of government, it can lay down a general line of political policy more or less in accordance with popular will, and formally control the state machine; but it can neither legislate constructively nor govern effectively." So what Rathenau called the military, ecclesiastical, administrative, educational, commercial and economic states exist within the "political and juristic" state, independent of it but yet subordinate to it and dependent upon what he regarded as a wholly inadequate parliament. He pointed to the obvious defect of what he described as "general installations for legislative mass production,"[2] defects common to all parliaments, but most pronounced, he thought, in that of pre-war Germany. The result of a vague realisation of this by the masses was, Rathenau believed, that they wanted a dual republic, of the parliament and of the

[1] Rathenau. *Der neue Staat*, p. 27. [2] Ibid., p. 29.

councils (*Räte*). This demand could in his view be met only by separating out the co-ordinate and interdependent "conceptional states" (i.e. the diverse intra-state communities mentioned above) and rebuilding them on a functional basis; only so could there be created a real democracy, a tribuneship of the people, a practical, just and intelligent legislature, government and administration, and the harmony of particularism and centralism.[1]

To Rathenau the trend of Germany in 1919 seemed from this point of view wholly wrong; the old machine was being replaced by one equally unsuitable and overburdened. An efficient government (in his sense of the term) would have to struggle with a parliament so weak and divided that whilst it seemed to lead it must be led, against undue multiplication of authorities and state particularism, against organised interests and the public opinion they create, and against the organised masses—there would always be revolutionary movements until they were made an integral part of the state structure.

Rathenau's ideal was the organisation of the state as an ordered and ascending series of self-governing bodies, each formed of appropriate local or "vocational" (*beruflich*) elements and with appropriate representative organs, i.e. a series of "functional" states with a "functional" parliament and a "functional" ministry in charge of a political minister of the *Reich* approved by and subject to the supreme Parliament.[2] On the other hand he objected to the *Räte* system as meaning a "unilateral mechanisation" which did not give recognition to any representation of the people generally and was a dictatorship of the working class.

The existing mechanical state had the rudiments of an organic popular and self-governing system, but the representative organs had been captured by the interests and at the summit the organic popular element had been lost in a "cloud of officials." That system, with its political, partisan, non-expert ministers at the head of the state departments and representing them before overburdened

[1] Rathneau. *Der neue Staat*, p. 35. [2] Ibid., p. 38.

and incompetent parliaments, must be replaced by one of "organic ability." Each minister must be head of a conscious "functional" state, which must be part of the whole state represented by the political parliament and must adhere to the general policy of that state but have the greatest possible freedom in the administration of its own affairs, co-operating with the other "functional states" in matters of common concern. The results would, Rathenau believed, be government by a harmonious combination of local and professional and occupational groups (the latter not having necessarily a territorial basis) and the cessation of all the rivalries of centralising and decentralising movements.[1]

Rathenau's idea of the "functional state" was then very similar to that of the English Guild Socialists, whose functionalism is based on producers' control. The difference between them is that Rathenau's state is an organic state of all human beings, i.e. democracy on a functional basis, whilst G. D. H. Cole's ideal state is based on a producers' democracy.

The most steadfast upholder of the *Genossenschafts-theorie* in our time is Kurt Wolzendorff, whose work is a development of the position reached by Gierke and Preuss; his conclusions as to the theory of the state are most clearly set out in his little book *Der reine Staat*, published in 1921.

Wolzendorff thought that the problem summed up in the phrase "Freedom and Statehood" had entered upon a new stage of its history. Every period of state life "brings with it a new conception of that problem resulting from the changed conditions of social life, and at each period men must ask themselves, without being misled by continuity of phrases, whether that idea of the state which is customary and apparently obvious as the result of tradition is still effective in the actual life of the human society." If the answer is in the negative, as to Wolzendorff it must be in 1920, then a new interpretation of the idea of the state must be found in order to give to

[1] Rathenau. *Der neue Staat*, pp. 42–43.

the problem of freedom and statehood an answer which shall determine the nature of the new epoch. It must be recognised that there was in Germany a want of clearness and agreement of thought as to the state, and that indeed its whole basis was problematical. There was there, as everywhere, on the one hand a realisation of the need for the state, and on the other hand a moral reservation which went as far as indifference or even antipathy to it. This conflict showed itself in different ways in all the various intellectual, social and economic spheres, and was not merely a working-class reaction against the mechanisation of political life. True, the sense of the futility of the existing democratic-constitutional machinery of the state had been originally strongest in the proletariat, amongst which the disappointment felt when the state system seemed to remain in essentials unchanged even after 1917, had given rise to the so-called *Ratgedanke*, but that idea was only the expression of a general sentiment, and played a part in the doctrines of many political and social parties. Its history as part of the development of communist theory, and its spread as a result of the Bolshevik agitation, were only accidental; it represented a spiritual antipathy to that state mechanism which by its "sure and soulless functioning" had led to the great catastrophe and when it broke down automatically reconstructed itself and made the new leaders into the same type of mechanics as the old. The idea resulting from this feeling was that people should create for themselves, directly from their social, economic and intellectual position and functions, the law appropriate to that position and functions, and that the task of the state should be simply that of maintaining by its governmental machinery the inviolability of the law so created. This is in short the principle of the separation of what is economic and spiritual from that which belongs to the legal sphere of the state. The application of the *Räte* conception to the economic life of the community meant the transference of the task of creating systems from the machinery of the state to the forces of individual and commercial-industrial life.

To Wolzendorff the whole problem for the state, emerging from the social life of to-day, was the same problem that had occupied the best minds of Germany a century earlier, for the regulation of the systems of the various classes and interests by their own wills, and the sanction of those systems by the state, was only what legal and social theory had called self-government (*Selbstverwaltung*). From the standpoint of social science it can be better described as a division of functions of equal importance and equal rights; from the standpoint of political science it is the possibility given by the state to a class or interest of setting up and operating its own system of life recognised and protected by the state. Self-government in the modern state is, as the theory has long recognised, itself only one form of the decentralisation of the state. Centralisation and decentralisation can be on either a regional or a functional basis. In the Prussian state of the later nineteenth century functional decentralisation in some branches of the collectivity appeared alongside of regional decentralisation, and this was a reversion to the basic ideas of Stein and Hardenberg, Scharnhorst and Boyer, and to the classical German theory of the legal state.[1] For that doctrine did not imply that in the spheres from which the state stood aloof, when it restricted itself to law and security, there was a vacuum or the anarchy of individualism; it meant rather that scope was given for the creation of a social system made up of voluntary *Genossenschaft* structures.

A new epoch had now commenced. The last one thought the problem of statehood and freedom solved by the creation of a system of political and legal institutions which gave to the people protection against arbitrary interference by the organs of the state power in their spheres of individual freedom and the possibility of influencing the state power by the exercise of political rights. In our own time the idea prevails that the essentially formal character of the state does not afford sufficient security for the material freedom of the in-

[1] Wolzendorff. *Der reine Staat*, p. 11.

dividual, since by the use of powers which are not within the scope of the law and are outside *interesse status publici* the mechanism of the state can have effects which impede and are even fatal to the life purposes of its institutions. So there arises the thought that on the one hand social forces and activities must have a sphere of organising influence outside the state and free from its authority, and on the other hand the state machinery for the *interesse status publici* must be free from the intervention of those forces and activities. The problem for the state becomes then that of the demarcation between the social functions of the state and of non-state organisations respectively, or, in other words, of determining what is the essential function of the "pure" state.

The true conception of the state is, in Wolzendorff's judgment, derivable only from the realisation of the fact that the state is an unique structure of human society, and its nature must be determined by that uniqueness, which lies in the self-originality of its authority. All power in the social system derives from the state; it alone has power of itself; no other power than its own is necessary for its existence.[1] All disturbances of the social order are due to the exercise of power in a manner which is wrongful or felt to be so, that is to say, to a perversion of the way in which the state nature expresses itself—for the true and essential direction of the state can be only the proper system of that social life of which it is the final support.

As regards the relation between law and state, Wolzendorff fully accepted Gierke's dictum that "state and law are twin powers." "The state," he wrote, "needs the law in order to establish its system, but the law also needs the state and its power in order to have that guarantee of its validity which is the psychological prerequisite for that conviction of its validity which determines its nature and conditions its existence." The state cannot create law from itself; conversely the law cannot create the state and its power; each needs the other. Law,

[1] Wolzendorff. *Der reine Staat*, p. 14.

being the more profound principle, in the last resort places restrictions upon the state. The state, having the greater vitality, will and must attempt to determine the law in order to preserve in full vigour its power and the social interests which support it, but by its very nature this effort is justified only in so far as the life of society necessitates the influence of the state, of power upon its system.[1]

The power of the system which is to be for us the state can have an assured existence only if a perfectly definite structure secures a corresponding functioning for its fundamental laws, and that is conceivable only if interference with the machinery of the state is made impossible for any forces which are by their nature directed not towards the realisation of the state principle, the interest of the community, but towards that of other interests. The most dangerous of those other interests are economic. A system in which the political power seeks to rule over and through economic interests and forces is doomed to degenerate socially and politically, and a system in which economic forces, whether called "capital" or "labour," acquire political power is equally doomed to decline. The separation of the organising activities of economic interests and political interests is an absolute necessity to the state; and the same is true of the state in relation to the life of the spirit.

This independence of the spheres of non-political, intellectual, economic and social functions is, Wolzendorff contended, a postulate resulting from the need for the simplicity, clarity and security of the state's function, i.e. the essential limitation of the state to its function as a systematising power in the law of social life is a law of life of the state itself. But the pure state is inconceivable without the self-ordered social system of those functions which lie outside the scope of the state itself, namely the spiritual and economic life of the community; but as that system can be only one of self-government—in contrast to the wholly independent self-organisation of the state—

[1] Wolzendorff. *Der reine Staat*, pp. 15–16.

the problem of the separation of statehood from these functions is also one of combination with them.

The idea of the "pure" state was, in Wolzendorff's judgment, neither conceivable nor attainable without the self-government of those spiritual and economic social functions which do not belong to "pure" statehood. But the state must live among them. It is a corporation formed of human beings and can exist only by means of their powers; it needs economic resources and spiritual forces.[1] The more the idea of the independence of spiritual and economic life becomes a reality the more will the state be able to leave to its organisatory activity; but the more it does so will the interdependence increase, though its nature will change.

If we want to describe in a single phrase the nature of the "pure" state, the history of the life and theory of the state drives us to this: the nature of the state, the power of system in the law of social life, lies in what is actually as well as historically the core of the modern state, namely the "police power," meaning thereby the *jus politiae* to the full extent of the original meaning of the term, including the *jus supremae inspectionis*. In this respect the pure state is the principle of the modern state freed from the exaggerations which were manifested by the "police state" in reaction from the anarchy following the break-up of the mediaeval system.

Wolzendorff agreed with Jellinek in regarding the modern state as a continuous process in favour of state activity in contrast to that of the individual. But Jellinek had already observed that, whilst on the one hand there was a movement beyond the state to a large international collectivity, there was on the other hand a movement within the state towards smaller collectivities. Jellinek had communal activities chiefly in mind, but these were only one manifestation of a general social phenomenon—self-government on a *Genossenschaft* basis. It is a process of decentralisation; its purpose is not the destruction of the state but a compromise with it. The process began

[1] Wolzendorff. *Der reine Staat*, pp. 21–22.

with Stein's reforms in Prussia—it was a reversion to the old Germanic *Genossenschaft* principle and a struggle against the modern institutional state idea with its stamp of Roman formalism.

Wolzendorff argued that the development of state life with the vitally necessary working out of socialist ideals must bring mankind back to the ideas of the Age of Enlightenment (*Aufklärung*) and of the legal state. That is the inevitable consequence of the conflict between the ideal of freedom, which gives to the socialist idea its human and political driving force, and the police-like rigidity and frigidity which is certain to come upon any system brought about by the power of the state. So Wolzendorff believed that "the strength of the German nature in the sphere of the state, as in every other sphere, can, as it lies entirely in the spirit, be brought to development and made of value to the external life only in and by the full establishment of personality." This had been the creed, conscious or unconscious, of German poets and thinkers, political scientists and statesmen; it underlay the *Genossenschaft* conception; it was the cause of the reversion to the idea of self-government by so many who were seeking for a solution of Germany's troubles after the Great War. Wolzendorff asserted that programmes of popular sovereignty and of catalogued rights of freedom had never been of any use to the German spirit. The practical renunciation of the state must give rise to a longing for new and truer values, and this must lead back to the old Teutonic idea of community which conceived of the state as a legal association, i.e. as an association in which all the members of the nation have grown up together out of the law which is living and innate in them.

Because the law which is the bond of community has its root in mankind it can be ascertained by men only from the functioning of their life, and cannot be established by the political organisation of its own power; the collectivity itself can regulate its life only in co-operation with its members, and the administration of the com-

munities of economic life and of spiritual life is not state administration but self-government.

Wolzendorff's ideal of the "pure" state is "a part of the national life," i.e. one of its "values." But it is a product of a very special kind. It is the outward representation of the national community; it is the plenary agent not only of its power but also of the law, which comprehends all the values, powers and interests of the people. But Wolzendorff declared that "the state is only the form of the collective possession of these products—they have their source not in the state but in mankind." In making the state not the giver but the guardian of human values, the idea of the "pure" state gives a human value to the state itself, and what it takes away in respect of the scope of the state's operation it lets it win back in the intensity of its inner life.

So Wolzendorff's aim, whilst replacing Gierke's theory of personality by that of the "pure" state, was the creation of the unitary decentralised state with a wide self-administration of economic and spiritual affairs. His combination of the idea of the functional state and of the legal *Genossenschaft* conception tends to approximate more to the political than to the juristic theory of the state. His fundamental thesis of the co-ordination between political and social (non-political) functions does little more than give a basis of functionalism to the old Germanic conception of the unitary decentralised state.

The development of the *Genossenschaft* principle in Germany has not meant any fundamental progress in legal science, but has contributed materially to its emancipation from the juristic dogma of positivist formalism and the theory of fiction and to opening the way to the construction of a new idea of the state based on the Germanic *Genossenschaft* principle.

The foreign followers of Gierke's pluralistic conception of *Genossenschaftstheorie* in general repudiate his theoretical method on the basis of organism, but accept his fundamental conception of the harmonious relation of plurality and unity and the recognition of the relative validity

of plurality and unity in the structure of the community—that is, Gierke's essential idea of unity in plurality.

As Kant did not content himself with Hume's scepticism of "something" which he cannot tell, so Gierke's theory of personality on the contrary was explained by Maitland as involving "something which the contract theory cannot explain—the personality of the organised group." The main issue to which Maitland adheres is taken from Gierke's idea of personality in his method of approach to justify the moral personality—right and duty-bearing unit—instead of the organic theory.

Maitland's method of justifying the group personality as a "rights and duties-bearing unit behind the screen of trustee" is purely English and is a repudiation of the organic theory. Though Maitland as a jurist left the explanation of moral personality to philosophers, Gierke tried to find the philosophical solution by means of the organic theory—in an ethical-spiritual organism.

Reality without metaphysics is not acceptable as the basis of philosophy to Germanists, whilst the merely theoretical precision of a system of philosophy does not appeal to English thinkers, except Bosanquet and his followers, as being merely metaphysical speculation. The metaphysical interpretation of political or juristic theories does not open the way to the realistic approach to politics and jurisprudence.

Taking almost for granted that reality is the basis of theoretical construction, a metaphysical or logical system of theory is deprived of realism at the expense of logical accuracy.

Duguit applies Gierke's system of relationship between state and law on his theory of *solidarité sociale*. Notwithstanding his entire repudiation of orthodox sovereignty and his denial of personality, he advances pluralist jurisprudence by his suggestive attempt to adopt functionalism in jurisprudence and to get away from dogmatic organism. Krabbe's pluralistic jurisprudence as legal decentralisation—i.e. the "transformation of organised

interests into legal community"—is undoubtedly a one-sided justification of Gierke's system.

Maurice Hauriou develops pluralist jurisprudence on a sociological basis. Being far away from Gierke's theory of organism and also from Durkheim's *conscience collective* he put forward his theory of the institution and foundation. He said "By virtue of the logic which governs the progress of ideas, it was natural that the theory of the institution and foundation, which followed historically on the subjective and objective systems, got its footing in the matter of the foundation of institutions, which had been sacrificed equally by the two antagonistic systems; its essential object is to demonstrate that the foundation of institutions has a juridical character, and from this point of view the bases of juridical continuance are themselves juridical. It has, moreover, profited from the feud between the subjective and the objective; it admits the dualism of these conditions, for in this opposition it sees not so much separate elements as the different conditions by which, according to the time, there can be either a corporative institution or a rule of law."[1]

Differing from the Neo-Kantian's abstract logical conception and from Krabbe's formula of juristic value, Hauriou's idea of social structure is "a composite order of things whose unity is really only by practical synthesis," and basing his construction on the logical conception of the widest possible practical synthesis of all the elements of social life he attached no value to a purely scientific formula and emphasises the importance of positive reality and the actuality of social formations.

As he pointed out, "institutions represent in law, in history, the category of duration, of continuity and of reality; the operation of their foundation constitutes the juridical basis of the society of the state."[2]

Hauriou strengthened Duguit's conception of the objective element of duration and community with the

[1] Maurice Hauriou. *La Théorie de l'Institution et de la Fondation.* In: *La Cité moderne et les Transformations du Droit.* Paris, 1925, pp. 9–10.

[2] Ibid., p. 2.

subjective element of reality and action by his own sociological interpretation.

No existence of society can be secured without the co-ordinate relation of the subjective with the objective element of a living society. For this subjective element of creation there must be individual beings and corporative institutions which constitute creative action and co-operation, whilst for the objective systems there must be the duration and continuity of group life for the existence of society.

The merit of his system was its similarity to that of Wundt's system of the relationship between the subjective and objective elements of social life. He said "an institution is an idea of work or of some undertaking which materialises and continues juridically in a social environment; for the realisation of this idea a power is organised which furnished itself with organs; on the other hand, among the members of the social group concerned with the realisation of the idea it produces manifestations of common action directed by the organs of power and regulated by definite rules."[1]

Thus he formulated the conception of corporation personality not on things of will and of organism such as has been advocated by Gierke, but on that real subordination of the common interests which is the union binding the members of the corporative body.

Through the process of *interiorisation* and *incorporation* Hauriou emphasises *personification* as the organised group which manifests *communion en idée*, i.e. a communion or participation in the common interest, in the idea of the enterprise for the realisation of which the organised group comes into being.[2] He said: "The subject of a state is really as it were a shareholder in that enterprise which is the state. And it is this situation of subject which engenders in the end the quality of citizen, because, being exposed to the risks of the enterprise, it is proper that he should acquire in return a right of control and of

[1] Hauriou. *La Théorie de l'Institution et de la Fondation.* In: *La Cité moderne et les Transformations du Droit*, p. 10.

[2] Ibid., pp. 17–21.

participation in the management of that enterprise." And he added: "The bases of the organisation of governmental power are themselves wholly spiritual; they come back to two principles, that of the separation of powers and that of the representative system."[1]

Rejecting Durkheim's conception of the *conscience collective* as involving merely the formation of an average opinion of the mass of minds in a society, and preferring that of the directing idea formulated by the highest intelligences and taken from them by a majority of minds in a society, Hauriou said that "between these two analyses there is the difference which separates the explanation of the progress of civilisation by the action of the select few from the explanation of that progress only by the evolution of social conditions (*milieu*). The communion of ideas, that is Ariel; the collective conscience, that is Caliban."[2]

The German attempt to make the power of will (*Willensmacht*) into the subject of the moral person is, Hauriou thinks, erroneous, because "the power of will, despite its elasticity, would not secure the coherence of the manifestations of will if it were not at the service of a directive idea; for in what direction would it secure continuity? It is a matter of the continuity of a trajectory and only the directive idea can, in determining itself as subjective, in order to introduce itself into the acts of will, determine of its own dynamic force the curve of this trajectory. The real subject of the moral person remains, then, entirely the directive idea of action (*œuvre*), of which the passage to the subjective state in the consciences of the group members is assured both by the manifestations of communion and by the stretching out of the tentacles of power which bind these members together—a power of which one part is in the will of the organs, but of which one part also is in the directive idea itself."[3]

He admitted the irrelevance of the psychological

[1] Hauriou. *La Théorie de l'Institution et de la Fondation.* In: *La Cité moderne et les Transformations du Droit*, pp. 16–17.

[2] Ibid., p. 21.

[3] Ibid., pp. 31–32.

identification of institution with its reality, but urged that as the object of law is the product of social phenomena, the personality of the institution is something real. In his juristic interpretation of the construction of the social institution the main value of Hauriou's theory is its repudiation of the collective will and conscious connection with the organic theory and the replacing of it by a *communion en idée*, and in putting before us the social reality of the corporative institutions founded on the interrelation of wills with the harmonious co-existence of the subjective and objective elements of social dynamics. This he calls "social vitalism" and of it says that the "directive ideas, of a perceptible objectivity since they pass from one mind to the other without losing their identity and by their natural attraction, are the vital principle of social institutions, in that they bestow on them life of their own separable from that of individuals, to the extent to which the ideas themselves are separable from our minds and react on them."[1]

This interrelationship of the elements of social life, that is, the pluralistic conception of social organisation, must be regarded as far more realistic and sociological than Gierke's system.

Gierke's influence towards pragmatic jurisprudence in America, such as that of Roscoe Pound and his followers, is slight, since pragmatism or humanism is based on a philosophy entirely different from that of Gierke. The effect on the growth of political pluralism is somewhat dubious, but so far as concerns its relation to legal science the *Genossenschaftstheorie* has had immense influence towards the justification of unity in plurality in the social organisation. Though Laski, a representative authority among pluralist political thinkers, himself denies the direct influence of Gierke in respect of his idea of the "creative adjustment" of interests and desires of individuals and groups, yet the indirect influence cannot be denied so long as he admits the group as somehow

[1] Hauriou. *La Théorie de l'Institution et de la Fondation.* In: *La Cité moderne et les Transformations du Droit*, p. 45.

"real" on the lines of the legal justification of Maitland's group personality.

Gierke's influence on English jurists and political thinkers is unique.

A great English jurist, Frederick Pollock, agreed with Gierke's attitude towards the fictitious personality, saying that "the English lawyers have never taken dogmatic theories of any kind much to heart; our doctrines get settled either by a gradual process of semiconscious consent worked out in the solution of particular cases, or by the development in the same manner of the conflicting tendencies in professional and judicial opinion until the decisive practical choice is called for."[1] On this assumption he concluded that, as to whether common law has received the fiction theory of corporation or not, he made "bold to answer in the negative."[2]

In legal science the first advocate of Gierke's theory in England was undoubtedly Maitland who, in opposing Pollock's remark that "the greatest of artificial persons, politically speaking, is the state,"[3] said: "ascending from the legal plain, we are in a middle region where a sociology emulous of the physical sciences discourses of organs and organisms and social tissue, and cannot sever by sharp lines the natural history of the state-group from the natural history of other groups. Finally we are among the summits of philosophy and observe in regard to the state how a doctrine which makes some way in England ascribes to the state, or more vaguely the community, not only a real will, but even the real will, and it must occur to us to ask whether what is thus affirmed in the case of the state can be denied in the case of other organised groups; for example, that considerable group the Roman Catholic church. . . . If we pursue that thought, not only will our *philosophische Staatslehre* be merging itself in a wider doctrine but we shall really be deep in the *Genossenschaftstheorie*."

[1] F. Pollock. "Has the Common Law received the fiction theory of Corporation?" In: *Festschrift Otto Gierke zum Siebzigsten Geburtstag*. Weiner, 1911, pp. 105–106.

[2] Ibid., p. 123.

[3] Pollock, *First Book of Jurisprudence*, p. 113.

In political science the appeal of the *Genossenschafts-theorie*, though superficial, is to Figgis one of the incentives to the rise of the English pluralist idea. Pluralism, such as has been advocated by the Webbs and Cole, is based solely on functional plurality without any idea of unity in plurality, and it leaves the unity to the invisible hand of pluralistic social dynamics.

H. J. Laski, though rather teleological in theory, accepts—if only indirectly—the source of the *Genossen-schaftstheorie*—"unity in plurality." The political pluralism of which Laski is a leader in our time is based on the empirical philosophy of pragmatic pluralism with which Gierke did not agree. Their philosophical bases are different, but their aims are the same in kind, though differing in degree.

Though in theory both reach the goal of the equilibrium between unity and plurality, the methods of approach to the ends are not by any means the same. Laski's adjust-ment of desires of individual and groups in the community, though he admits groups as real, gives way to the partial denial of the theory of the corporate personality which Gierke endeavoured to formulate. What is common to them both is the recognition from different angles of the personality of the narrow groups in relation to higher ones and finally to the state as some-thing real; Laski recognises it through the teleological focus whereas Gierke does so through the organic one.

In the modern state, as it has existed, the federative authority cannot be fully recognised without assuming the personality of the component members, either individuals or groups.

I will indicate as briefly as possible the nucleus of Gierke's theory of personality on which adequate criticism has not yet been made.

Whilst he postulated complete equality of personality in the legal as in the physical sphere, saying that "human associations are really existing beings and therefore real persons in the sight of the law,"[1] he clearly defined the

[1] Gierke. *Genossenschaftstheorie*, p. 406.

association personality as a capability of human association recognised by jurisprudence as being a whole differentiated from the sum of its parts and a legal subject of rights and duties.

Gurwitsch has pointed out[1] that Gierke's doctrine of the reality of the union person has been generally understood as an assertion of the empirical actuality of the union-unity analogous to man as a psycho-physical subject, and so he has been accused of anthropomorphism. It is true that Gierke had given some occasion for this by speaking, in connection with his assertion of the reality of the union-person in an objective sense, of the "social will power" and the "corporeal-spiritual life unit" of the union as giving the empirical basis of juristic personality. But careful study of Gierke's writings shows beyond any doubt that his assertion of the reality of the union personality does not bear the meaning alleged, but means the objective validity of the union personality as an independent juristic entity side by side with the individual, just as the assertion of the reality of the total value of the association means the assertion of the independent entity of the super-personal *vis-à-vis* the personal.

His justification of personality as ethical validity leads him to regard the historical forms of associations as the manifestation of the ideal association in its transcendental value.

But since his main attempt to conquer individualism naturally leads to empirical historicism and sociology, he makes a clear demarcation between the philosophical ethical and metaphysical ideal concept of value and its historical realisation.

His ideal basis of personality is purely juristic in character and philosophical in nature.

The term "reality" was used by Gierke in the same sense as by the mediaeval realists in their controversy with the nominalists: Gierke had to combat a juristica-ethical nominalism in the cause of the realism of the ethical value-structure and the juristic union-person.

[1] Gurwitsch. *Gierke als Rechtsphilosoph. Logos*, 1922. XI., p. 11.

Kant had used the term "objective reality" in the sense of objective validity. The "realist union theory" of Gierke, however, asserts simply that this objective validity of the legal subjectivity of the unions is on the same basis as that of the individual person.

The realism of the ethical and legal value of union-personality is the expression of the equality between the objective values of the legal subjectivities of the union and of individuals.

Gierke's main effort is to get rid of the methodological mistakes of the conception of fictitious personality which the Romanic theory of *persona ficta* and the positivist juristic person, so as to conceive the legal subject as psycho-physical being and to contrast the associative person with the artificial "legal person."

His opponents criticised his theory of personality as psychologically untenable; but his aim was solely the removal of the invidious distinction between the individual and the collective person as subjects of the law. The main weakness of his theory is the application of the idea of organism to his *Genossenschaft* system. But, as he himself clearly stated, this is merely by way of analogical interpretation, the comparison of natural and social organisms in order to prove the legal justification of corporate personality. Its aim is purely legal. Gierke himself admits that natural science has left something in the organic theory unexplained, so that the riddle of organism is the same as that of life. His statement that "the internal structure of the whole whose parts are human beings must be a kind for which the natural whole does not provide any model" invites criticism from the standpoint of modern social psychology and sociology. But his assertion that there is no association nor corporation valid in law "without being a subjective unity in the law" is his main application of the conception of personality on the organic theory.

The corporate person to Gierke is therefore the legal and ethical person with legal capacity of will and action as subject of law.

Nevertheless no follower of the *Genossenschaftstheorie* can wholly accept Gierke's organic theory. Modern social psychology must be based on a more comprehensive interpretation of the relation between collective and individual personalities than that afforded by the analogy of the biological conception of organism.

As long as the modern state has its foundations in the pluralistic community, the teleological approach to the state-theory is essential, as it is a final arbiter in the dispute between different interests. Ihering's theory of *Zweck* has a certain value far beyond the mere utilitarianism which Gierke ascribes to it.

Gierke's philosophy is a theory of the harmony between unity and plurality, and his ethics have Kantian righteousness as his categorical imperative. His ethical justification of this harmonious co-ordination and synthesis is simply complete harmony between individuality and collectivity on the judgment based on the verdict of the Kantian category of absolute goodness.

Since he takes almost for granted the super-scientific Neo-Kantian methodology as applicable to the harmonious process of individual and plural rights, his method of approach to the ethical validity of personality is devoid of realistic measures and is nearer to the same road of rationalism. But though he utilises Cohen's philosophical process to explain relations between internality and externality, yet his final criterion for the judgment of the harmony of plurality and unity is based on the philosophy of history by the medium of the actual realisation. The theory of will, to Gierke, makes use of the theoretical justification for reality of personality. In my judgment his idea of will is entirely different from that of the philosophical notion of general will or the fictitious conception of the validity of majority will. It is the manifestation of the actuality of the personality which has a capacity of will and action in the legal sense. That is the cardinal legal characteristic of the *Genossenschaftstheorie*. It is a thoroughly legal conception. But criticism is due to the theory of will of the corporate personality to which

Gierke seeks to attribute a capacity of will and action similar to that of the individual.

Nevertheless, Gierke himself clearly indicates that the physical nature of individuals ends with the individual person—i.e. the organic theory of natural science ends—and the organic theory of association begins at the same point.

The application of the organic theory to the human association is legally useful and appropriate to his conception of unity in plurality and to the justification of the interdependence of the particularity of the individual person from the collectivity of the corporate person, and of the co-ordination and subordination of the gradual relationship between them. The group theory of social psychology had not yet been accepted in the 'seventies of the last century. The pragmatic theory of pluralism has not yet been introduced into German jurisprudence, for its theoretical basis is not easy of acceptance to the German mind. So that the pragmatic approach to the theory of social organisation is an inevitable process as to which Gierke's main aim is to formulate a theory of human association, not from its top, but from its foundation. The judgment of federative harmony between unity and plurality in any association is the realisation of the actual reality through the medium of historical continuity of facts.

Sociologically neither Hobhouse nor Wundt nor Durkheim agree with the organic theory. But at the same time none of them can be wholly independent of the idea of organic relationships between the whole and the parts.

Modern social philosophy requires a realistic approach to human society—to some extent the application of the pragmatic method on an ethical basis. Pragmatism is the system and basis of the philosophy by which the scientific method of approach to philosophical justice can be established.[1] What W. Y. Elliott calls "contemporary

[1] F. C. S. Schiller. *Studies in Humanism*, 1922. "For Voluntarism is the metaphysic which most easily accords and harmonizes with the experience of

vulgarity" is not altogether the rate at which it ought to travel. No pragmatism is philosophically justifiable without its ethical basis. Utilitarianism and idealism, rationalism and empiricism, realism and formalism are the theoretical processes of approach to the ultimate ends; the choice depends entirely upon the philosophical beliefs of the theorists.

It is quite true that the pragmatic approach is not at all an easygoing method as the result of the repudiation of the metaphysical formula of the philosophical imperative, but it is far more difficult to form an adequate method and a just criterion by which the way to serve the end and the end to serve the way can be harmoniously correlated. No idealists can, however, formulate their own

the activity with which all our thinking and all our living seem to overflow. Metaphysics, however, are in a manner luxuries. Men can live quite well without a conscious metaphysic, and the systems even of the most metaphysical are hardly ever quite consistent, or fully thought out. Pragmatism, moreover, is not a metaphysic, though it may, somewhat definitely, point to one. It is really something far more precious, viz. an epistemological method which really describes the facts of actual knowing," p. 11.

"The problems raised by Pragmatism are so central that it has points of contact with almost every line of philosophical inquiry, and so is capable of being defined by its relation to this. What is really important, however, is not this or that formulation, but the spirit in which it approaches, and the method by which it examines, its problems. The method we have observed; it is empirical, teleological, and concrete. Its spirit is a bigger thing, which may fitly be denominated Humanism," p. 12.

William James. *Pragmatism.* "Pragmatism represents a perfectly familiar attitude in philosophy, the empiricist attitude, but it represents it, as it seems to me, both in a more radical and in a less objectionable form than it has ever yet assumed. A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power. That means the empiricist temper regnant and rationalist temper sincerely given up. It means the open air and possibilities of nature, as against dogma artificiality, and the pretence of finality in truth. . . . It is a method only. But the general triumph of that method would mean an enormous change in what I called in my last lecture the 'temperament' of philosophy," p. 51.

"No particular results then, so far, but only an attitude or orientation, is what the pragmatic method means. *The attitude of looking away from first things, principles, 'categories,' supposed necessities, and of looking towards last things, fruits, consequences, facts,*" pp. 54–55.

imperative theories without referring to the actual facts of the universe and environment. Machiavellian pragmatism in its method is entirely incompatible with the proper sense of pragmatism to which William James, John Dewey and F. C. S. Schiller have been striving.

The contribution which pragmatism has made is the system of approaching an end as the essential merit with which the reality of the human organisation, or realism, should deal.

Now the organic theory *vis-à-vis* the theory of personality is the nucleus of the *Genossenschaftstheorie*. The reality of human organisations is not altogether analogous to the organism, because, as Ginsberg points out, firstly societies are far more "plastic" and have more mobility and freedom and are more independent of their constituent parts than organisms; and secondly the "relations of parts to the minor parts and system within the greater whole differ" far more profoundly in the case of societies than in that of organisms.[1]

But no matter whether or not human organisation is an organic or teleological system, a community—the state—which is the highest human organisation in our time is a great society in which numerous groups of individuals and individuals are ingredient parts, territorially limited and legally bound imperatively. In accordance with political organisation both the state and its constituent groups of human individuals have something of a living reality insomuch as, like human individuals, they possess, though only in a limited sense, their wills, and powers to exercise them. This spirit or will, we may call it, is possessed by the state or groups within it and international associations in the ambit of their own aims—that is something real, what Laski calls group as real, Maitland designates as rights and duties-bearing unit, and Gierke materialises into the corporate personality. The personality or unit in this sense is limited in accordance with the natures and purposes of the given group or association,

[1] Morris Ginsberg. *Social Philosophy*. In: *Encyclopædia Britannica*, 14th Ed. Vol. XX, 1929, p. 866.

but the reality is the legal manifestation of the nature of association in modern society.

In this respect it is admitted that corporate personality in the legal sense is acceptable in the legal system not on the analogy of the organic theory, but on reality in the system of law, since the state has the legal imperative to exercise its power.

In the legal sense the state, numerous associations within the state and the international communities and associations have something of a specific and independent will, inasmuch as they are effectively the best realisation for the attainment of their aims.

In this respect, although Gierke's organic theory and the principle of corporate personality are inadequate as a method of approach to the justification of personality, yet the existence of a certain something real in the various national and international associations within and without the state cannot be denied. Therefore the theory of personality in a limited sense is beyond dispute. In this respect the contribution of the *Genossenschaftstheorie* to real political pluralism is the aim to which Gierke, though unsuccessfully, endeavoured to attain, but this is not the case with the method which he applied.

The organic theory is based on relativity between individuals and groups. The danger of the theory lies firstly in the appropriation of unitarism, and secondly in the question whether this relationship can fully explain the complexity of relations of unity within unity, of groups within groups and of individuals within groups and unities, and so forth.

These two criticisms may be answered, to some extent, by Hobhouse's explanation that without an adequate share of individuals in the decisions and functions of groups the organic theory tends to be futile.

In political science democracy presupposes that individual representation shall be as far as possible direct, whereas organic gradual representation tends to be indirect representation, in which the real manifestation of democracy may be submerged.

The equilibrium of unity and plurality in each group in the co-ordinate relations between it and the higher group and the state is the true democracy at which equality of group values should aim. Gierke's organic theory itself may teach us the relation between them, but it does not point to the proper method of the participation of the parts in the whole, i.e. of representation; that still presents the danger of developing into unitarism.

But the third danger of this organic theory is fundamental; it is whether the wills of individuals can harmoniously be embodied and the will of the group be different from and independent of that of individual. The value of personality is unique. The interest of personality is social in character and good for society as a whole—something at which Plato aims in the ideal state.

Can individual wills be embodied in the wills of the groups? The value of the will of groups is only conceived in a relative value to the wills of individuals for certain aims and purposes to which the groups are striving. Gierke's will of personality, though entirely differing from the metaphysical notion of general will, cannot be justifiable without confirming legal personality.

Against the hierarchy of sovereign authority his organic theory is useful in order to justify the theoretical value of the lower forms of association or corporation in the state. Therefore, as Gierke himself assumed, the validity of the corporate personality and of its general will is nothing but the utilisation of the conception of organism by means of the denial of the formalistic and fictitious theories of state supremacy.

No criticism of any theory is valid unless it is related to the general social condition of the time and generally accepted theory of the epoch. Therefore I must here set out the merits which Gierke's system has in relation to the future development of political science.

Firstly, Gierke formulated the fundamental conception of the harmony between unity and plurality in legal and political ideas. Consequently the minor associations in the higher and predominant association have their own

existence as real as that of the parts of the human organisation.

Secondly, human association is based on relativity, not on absoluteness; and on reality, not on fiction. That is, the whole structure of human association is based on the relativity of the authority which they contain even in the system of law.

Thirdly, history—the factors of experience in the past and the present—is the basic criterion.

Fourthly, the human organisation, from the commune to the state and international organisation, is after all human association, whether called *Genossenschaft* or corporation or institution. That is to say, the method of approach to the theory of the state is from the bottom upwards, but not from the top downwards.

Fifthly, relativity and reciprocity in the human organisation are what he calls interdependence, in which there is no subjection of one association to the higher ones, but there is its co-ordination and subordination of one to the higher associations.

Sixthly, the total human organisation should be unity in plurality, but not plurality in unity.

These fundamental ideas which Gierke seeks in legal and practical organisation are undoubtedly valuable suggestions for the political structure of the present and the future.

Therefore there can be no hesitation in giving the highest admiration and praise to his life's work.

His ideal state was the mediaeval state which was the organisation of the collective nation—ruler and ruled—in political and juristic unity; that is the idea of the state which is manifested in the *Genossenschaftstheorie*. His definition of the modern state in the category of the conception of sovereignty is only the reflection of the present-day state which was bound to affect the natural law and the mediaeval fiction theories. His weakness was his tendency to that extreme nationalism which was a common feature of the German jurists and philosophers of his time.

Even taking Gierke's *Genossenschaftstheorie* almost for granted, the ultimate end of his state theory should be the renunciation of the conception of sovereignty, just as Gierke himself assumed that the individualist theory of natural right made use of sovereignty for the justification of the absolutist theory of the state—and the formation of the theory of the state on the same political and legal basis as that of all other political organisations.

As the public and private law—social and individual law—are based on relative spheres, so the state is not the highest political corporation, but is subordinate to the international community. The relation between the state and the international community is similar to that of the local or functional corporation to the state.

The *Genossenschaft* theory of the state has therefore to be developed into a new theory of a decentralised state system with self-administration and subordination to the federative international authority, based on function on the one hand and on organisation on the other.

To political science, especially the theory of political pluralism, the organic theory of the *Genossenschafts-theorie* cannot be acceptable, since analogy has no value in the realistic approach to political theory. But Gierke's conception of the relationship between the narrower legal corporation and the state is undoubtedly a contributory principle to which political ideas must always be indebted, because relativity is a necessary prelude to any conception of unity.

Not only this but also the introduction of the corporate personality as real, though political thinkers cannot accept it without reservation, recognised personality as something real to the groups or associations, materially as well as spiritually, in order to justify the system of decentralisation and self-government.

The relation between collectivity and individuality in the modern state is the rationalising of the desires of individuals and groups in the conscious harmony and solidarity of the innumerable diversities of interests and purposes, on the principle of unity in plurality.

The essence of the *Genossenschaftstheorie* should not be so conservative as he advocated in arguing that the state should be based on a compromise between the ideas of the monarchical and democratic state, but on the contrary it should be democratic, as Preuss develops it, and socialistic as Wolzendorff tends to assume it. Its ultimate development is undoubtedly Rathenau's ideal of socialism.

The law is the "product of the national spirit" and the state is the product of human association. As the system of law should be federative, so the authority of the state must be federative. Groups are real. The human community should be based on the harmonious synthesis and interdependence of the social dynamics of unity and plurality. The highest manifestation of state organisation is the equilibrium of these contrasting forces in a final harmony. Political pluralism is the rationalising of these forces of social organisation for the best realisation of the desires of individuals and groups in their creative adjustment.

Since most of our laws are "only approximations and no theory is *ipso facto*" absolutely a transcript of reality, its great use is to summarise old facts and to lead to new ones. In this respect the service which Gierke has done for the progress of political ideas is to establish the basic principle in the transference from the old to the new way of thinking, i.e. from the monistic metaphysics to pluralistic realism.

The real value of Gierke's contribution is to sweep away legal dogma and to open the road which present and future pluralists must follow to reach the goal of the perfection of the pluralist theory of the state.

The modern state in its *raison d'être* is a "Leviathan" which possesses the power to carry its will into realisation. That power, termed by German jurists *Herrschaftsgewalt*, and by the Austrian, Kelsen, *Zurechnung*, approximates to the prevailing conception of sovereignty. The growth of the international power of interference in the absolutist state and the rise of the internal self-government of

political and economic associations have led to the denial of sovereignty.

No matter whether the ethnological or sociological theory of state is correct, the state itself is incontestably the concrete form of human association. The conception of sovereignty is the legal invention with which the modern state has been invested. Interpreting the theory of sovereignty in its legal sense, the attribution of this absolute quality to the state is essential for the purpose of converting the mediaeval into the modern authoritarian state. In the history of political and legal ideas two attempts have been made by theorists to modify the absolute conception of sovereignty as an inherent characteristic of the state. The one is to formulate the conception according to their own definition, such as the theory of divided sovereignty or, as Carl Schmitt reasoned, by affecting the state as the final authority in disputes. The other attempt, taking for granted that sovereignty is absolute and indivisible, endeavours to change the inacceptable notion of sovereignty into something else. This would entail the bankruptcy of the conception of sovereignty as an essential characteristic of the state. The theory of divided sovereignty originated with Marsiglio, Althusius and Locke, and was later developed by the American federalists and Georg Waitz and his school. The latter view is at present advocated only by a few of the most advanced thinkers—Hugo Preuss in Germany and Harold J. Laski in England.

Preuss substituted the term "territorial supremacy" and Laski that of "legal imperative" for that of sovereignty. Since the state is a product of human organisation, the modern state, even though not entirely built up on sociological or Marxian materialist theories, is undoubtedly functional—i.e. federative—in character and teleological in nature.

No monistic theory of the state is valid unless the state itself is the absolute entity of the will of individuals. No realisation of such freedom is to be found in Hegel's absolutist state and, as Hobhouse rightly explained, the

justification of the general will of the state is nothing but that of coercive power. The analogy of natural science to political science has already been proved as erroneous in method, and consequently as devoid of realism and falls into the same abyss as philosophical idealism. Therefore the present-day political scientist, looking beyond the horizon of traditional belief, must formulate the theory of the state on an unbiased and unprejudiced basis. It must be an attempt to conceive the state authority cloaked in formulae fully adapted to its compatibility with the modern body politic.

The basic conception of society has shifted both in practice and in theory from *laisser-faire* individualism to rationalised collectivism. The highest virtue of collective goodness on the basis of equality has been substituted for the highest virtue of the fullest realisation of individual freedom in the individualistic world. The principle of socialism—democratic collectivity *vis-à-vis* the highest realisation of the liberty of the individual by means of equality of social dynamics—has become the general spirit in the highly developed modern state. Even the bourgeois state has adopted the collective spirit as its ultimate development of trusts and combines—the so-called establishment of systematised capitalism. The present stage of capitalist development tends towards the rationalisation of all the principal branches of industry, but still on the basis of the *laisser-faire* economic system.

In the new social order of the future the power of the state will comprise final authority to rationalise the planned social order in full co-operation with international control. This plan in the national and international social order should be based on a new conception of federative function in unitary control, i.e. unity in plurality in nature and functional harmony of centralised and decentralised social dynamics in system. The planned system in politics and economics must include the rational allotment of all social forces in order to meet the demand of every human community.

The state in its nature should yield up its supremacy

in many branches of human activities and subordinate itself to the international control of the world government.

In this transition period the aim of the state will be important not only as to rule but as to the establishment of harmony between rulers and ruled. If the state fails to promote the harmonious co-ordination of interests, then it will revert to the dictatorship of the few to the detriment of the many.

But the rise of the fascist state and the development of the communistic state *vis-à-vis* the hierarchy of the financial interests of the world are likely, for a certain period, to produce the temporary bankruptcy of the legitimate development of true democracy. The test of modern politics lies in the statesmanship of the socialist movement.

Accordingly the only alternative is to create a new method, i.e. the pragmatic approach to the theory of the state. Through this system alone can the new theory of state be inaugurated on a scientific realisation of the political organisation. Only through this method of study can a state in the new social order—a socialist commonwealth—legitimately be rationalised under the highest creative adjustment of plurality and unity, i.e. the reconciliation of "planned" social order with the claims of liberty and equality.

In consideration of this view I conclude by repeating that Gierke in his theory and his ideas was a man of 1871.

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